TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 111

GO-BART IMPORTING CO., PHILIP D. GOWEN, AND WILLIAM BARTELS, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1930

CERTIORARI GRANTED JUNE 2, 1930

(35,021)

(35,021)

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Record from the district court of the United States, Southern New York	1	1
Order to show cause	1	1
Affidavit of Philip D. Gowen in support of order to show cause	4	3
Affidavit of William Bartels in support of order to show cause	11	8
Affidavit of William Bartels as secretary-treasurer of Go-Bart Importing Company, Inc., in support of order to show cause	19	12
Warrant of arrest, annexed as Exhibit A, in support of order to show cause	28	18
Complaint, annexed as Exhibit B, in support of order to show cause	30	19
Affidavit of Ernest Braidwood in opposition to order to show cause	33	21
Affidavit of William Calhoun in opposition to order to show cause	43	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 8, 1930

	Original	Print
Affidavit of Eugene R. O'Brien in opposition to order to show cause	46	30
Replying affidavit of Philip D. Gowen in support of order to show cause	51	33
Replying affidavit of William Bartels in support of order to show cause	53	35
Replying affidavit of Ray Gardner in support of order to show cause	55	36
Replying affidavit of George Heath in support of order to show cause	57	37
Replying affidavit of William B. Flynn in support of order to show cause	59	38
Replying affidavit of Robert McCauley in support of order to show cause	61	40
Replying affidavit of William Howard in support of order to show cause	63	41
Replying affidavit of John R. MacNesbitt in support of order to show cause	65	42
Replying affidavit of John B. Hobby in support of order to show cause	67	43
Replying affidavit of Milfred A. Gants in support of order to show cause	69	45
Replying affidavit of Gertrude Intemann in support of order to show cause	71	46
Replying affidavit of Robert Nelson in suport of order to show cause	73	47
Replying affidavit of Joseph M. Dooley in support of order to show cause	75	48
Supplemental affidavit of Harold G. Sipe in opposition to order to show cause	78	50
Supplemental affidavit of Edward Collins in opposition to order to show cause	81	52
Memorandum of Coxe, D. J., denying order to show cause	84	54
Notice of motion for reargument	89	58
Affidavit of J. Edward Lumbard, Jr., in support of motion for reargument	91	59
Order of Coxe, J., denying order to show cause and motion for reargument	97	63
Notice of appeal	100	64
Petition for appeal	102	65
Order allowing appeal	103	66
Assignments of errors	104	66
Citation (omitted in printing)	107	
Stipulation as to record	108	68
Clerk's certificate (omitted in printing)	109	
Proceedings in United States circuit court of appeals, second circuit	110	69
Opinion, Swan, J.	110	69
Decree	126	79
Clerk's certificate (omitted in printing)	127	
Order allowing certiorari	128	80

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Complainant,

against

PHILIP D. GOWEN, alias "SLATER", alias "WATTS", ROYAL C. Gardiner, William Bartels, Patrick Smith, alias "Paddy", George Heath, John Howley, Count Francis de Polignac, Joseph M. Dooley, William Dooley, Ray Gardiner, John B. Hobby, "James" Most, First Name Fictitious, Chris Inteman, Arthur D. M. Cooley, George Levy, Joseph P. Stinard, Fred Schultz, "John" Moore, alias "Dinty", First Name Fictitious; George Flynn, alias "The Judge"; Charles Girassi, John Martinez, alias "Martini"; Max A. Gants, Arthur Mack, "Abraham" Spiegel, First Name Fictitious; Louis "Brown", Last Name Fictitious; Samuel "Smith", Last Name Fictitious; Yonkel "Levy", Last Name Fictitious; Nathaniel Johnson, Moses Lesser, Tony Frank, James "Jones", Last Name Fictitious; Robert Nelson, "Joseph" Girard, First Name Fictitious; "Richard Roe", Full Name Fictitious, the above names which are stated to be fictitious are so given for the reason that the full true names of these persons are unknown, Defendants

ORDER TO SHOW CAUSE—Aug. 22, 1929

Upon reading and filing the complaint herein verified by William J. Calhoun on the 5th day of June, 1929, the warrant of arrest herein issued by Honorable Garrett W. Cot-[fol. 2] ter on the 5th day of June, 1929, and the affidavits of Philip D. Gowen and William Bartels verified the 21st day of August 1929, together with the exhibits therein referred to and on motion of J. Edward Lumbard, Jr., attorney for the defendants Philip D. Gowen and William Bartels and for Go-Bart Importing Company, Inc., it is

Ordered,

1. That the United States of America, the complainant herein, show cause before this Honorable Court in Room

235, Old Post Office Building, Borough of Manhattan, New York City, on the 26th day of August, 1929, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees, and all other persons acting under its authority or direction and each and every one of them and all in privity with them, from directly or indirectly using as evidence the papers and documents seized from the said Philip D. Gowen and William Bartels and Go-Bart Importing Company, Inc., as alleged in the said affidavits, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies or reproductions made of such papers and documents.

2. That the United States of America, the complainant herein, show cause before this Honorable Court, at the same [fol. 3] time and place aforementioned, why an order should not issue directing the return of the said papers and documents to the said Philip D. Gowen, William Bartels and Go-Bart Importing Company, Inc.

3. That pending the entry of an order determining this motion, the complainant and each of its officers, clerks, attorneys, agents, servants and employees, and all other persons acting under its authority or direction, and each and every one of them and all in privity with them, be and they hereby are enjoined from directly or indirectly using as evidence the said papers and documents, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies, or reproductions made of such papers and documents.

4. That copy of this order and the affidavits annexed thereto be served on the complainant on or before the 23rd day of August, 1929.

6. That the said Philip D. Gowen and William Bartels and Go-Bart Importing Company, Inc., have leave to file and serve such rebuttal affidavits or such papers and exhibits as they may desire on or before the hearing of this motion.

Dated New York City, August 22nd, 1929.

Charles A. Boynton, U. S. D. J.

[fol. 4] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PHILIP D. GOWEN IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York, ss:

Philip D. Gowen, being duly sworn, deposes and says:

1. That he is one of the defendants in the within action.

2. That this motion is made for the purpose of obtaining an order directing the United States of America, the complainant herein, to restore to your deponent and to William Bartels and Go-Bart Importing Co., Inc., certain papers and documents wrongfully seized from your deponent and the said William Bartels and the said Go-Bart Importing Co., Inc., and to prevent the use in evidence against your deponent and the said William Bartels and the said Go-Bart Importing Co., Inc., of these documents and papers.

3. That the facts upon which the motion is based, so far as the seizure of documents from your deponent is concerned, are as follows:

[fol. 5] That for a long time prior to and on June 6th, 1929, deponent was an officer of Go-Bart Importing Company, Inc., to wit, its President. This Company is engaged in the business of importing, and has offices located at Room 1030—200 Fifth Avenue, New York, N. Y., within the Southern District of New York.

That on the 6th day of June, 1929, when your deponent entered the premises, at about eleven a. m., he found his office in the possession and under the control of three men, who stated that they were Government agents. Two of these men your deponent later learned were named O'Brien and Collins, and the third name is still unknown to your deponent. O'Brien stated to your deponent, that he had a warrant for your deponent's arrest and a warrant to search the premises. O'Brien thereupon exhibited a paper which he claimed was a search warrant and gave him a right to search. Your deponent requested him to leave a copy of the said papers with your deponent, but he refused to do so. Your deponent was permitted to read the paper which O'Brien exhibited but his request for a copy of the same

was refused. Upon your deponent's being placed under arrest his person was searched and miscellaneous papers and memoranda belonging to your deponent were seized. The agents also took from the person of your deponent some keys and under threat of breaking into your deponent's desk and his safe, forced your deponent to open his desk and his safe. From the desk and the safe they took various papers, documents and property belonging to and in the possession of your deponent, including journals, account books, letter files, insurance policies cancelled checks, [fol. 6] index cards and other miscellaneous property. Likewise, from other portions of the premises, they took papers, documents and property of a similar nature, belonging to your deponent.

Neither your deponent nor anyone on behalf of your deponent, nor anyone at the premises consented to search and seizure, but on the contrary the search and seizure was strenuously objected to. The government agents intimated, however, that if search and seizure were not consented to they would use force. The agents gave no receipts for any of the papers, documents or property taken from the premises or from your deponent.

After the said search and seizure your deponent was arrested and was arraigned on the said 6th day of June, 1929, before the United States Commissioner for the Southern District of New York, and held to answer on a complaint of conspiracy to violate the National Prohibition Act, in bail in the sum of Ten Thousand Dollars.

4. Your deponent is informed and verily believes that the three government agents were subordinates of William J. Calhoun, who, on information and belief, is Special Agent in Charge of Special Agents, Bureau of Prohibition, Treasury Department of the United States of America in charge of such agents operating in this the Southern District of New York.

5. Your deponent is further informed and believes that the aforesaid papers and documents were taken from the premises to the said office of the said William J. Calhoun at Room 2, Sub-Treasury Building, Wall and Nassau [fol. 7] Streets New York, N. Y., where said William J. Calhoun and his subordinates all of whom are government agents and employees, have been going over the same, to-

gether with Charles H. Tuttle, and his subordinates. That the said Charles H. Tuttle is United States Attorney for the Southern District of New York.

6. Your deponent is further informed and verily believes, that the paper which O'Brien and the other government agents described as a search warrant, was not a search warrant, but was in fact a warrant for the arrest of your deponent and other persons; that said warrant was directed to the Marshal for the Southern District of New York and to his deputies. Your deponent has annexed a copy of said warrant issued by United States Commissioner Garrett W. Cotter to these motion papers as Exhibit A.

7. Your deponent is further informed and verily believes that neither the Marshal nor any of his deputies, nor any person deputized by the Marshal for the purpose of executing said warrant, was present at the time said warrant was taken to Room 1030, 200 Fifth Avenue, where your deponent was placed under arrest.

8. Your deponent is further informed and verily believes that said warrant for the arrest of your deponent and for the arrest of others, hereto annexed as Exhibit A, was never recorded or delivered to the United States Marshal prior to the time of your deponent's arrest, and that it was in fact delivered to William J. Calhoun and/or one or more of his assistants, such as agents O'Brien and Collins; and [fol. 8] that the arrest of your deponent was illegal and in violation of his rights under the Constitution of the United States.

9. Your deponent is further informed by counsel and verily believes that there is a second reason why the arrest of your deponent and the search and seizure of his property was illegal, to wit, that the complaint filed before the United States Commissioner by William J. Calhoun, a copy of which is hereto annexed as Exhibit B, is insufficient in law in that it does not sufficiently state the crime with which your deponent is accused, and in that it is based on information and belief without disclosing the sources of such information and belief, and that it does not set forth facts showing that any crime is committed. For these reasons your deponent believes that the warrant issued by the United States Commissioner upon this complaint was im-

properly issued and void, and of no effect, and, therefore, that the arrest of your deponent was illegal and the search and seizure of your deponent's property was illegal and improper.

10. Your deponent is informed by counsel and verily believes that the records of your deponent have been used and are now being used by the said William J. Calhoun and the said Charles H. Tuttle, and their subordinates, and by other officers and agents of the United States for the purpose of securing further evidence against your deponent, and also for presentation to the Grand Jury.

11. Your deponent further contends that his arrest and [fol. 9] the search and seizure of his personal effects and records was illegal, in violation of his constitutional rights, and more particularly in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America.

12. Your deponent further states that irremediable harm will occur to him if the alleged use of the said papers and documents by the Government is permitted to continue.

13. In view of these facts, it is respectfully requested that an order issue directing the complainant to return forthwith to your deponent, all papers and documents of your deponent which are in the possession of or under the control of the complainant as heretofore alleged, and further enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction, and each and every one of them and all in privity with them, from directly or indirectly using as evidence the papers and documents seized from your deponent as heretofore alleged, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies, or reproductions made of such papers and documents.

14. The reason why this application is made by order to show cause instead of by notice of motion is that your deponent is desirous of preventing the alleged use of the said papers and documents as evidence by the complainant pending the determination of this motion.

[fol. 10] That no previous application for this or any similar relief has been made to any Court or Judge thereof, except that your deponent commenced a suit in equity against Charles H. Tuttle, individually and as United States Attorney for the Southern District of New York, and William J. Calhoun, individually and as Special Agent in Charge of Special Agents of the Bureau of Prohibition, Treasury Department of the United States of America, and sought to enjoin the said Charles H. Tuttle and the said William J. Calhoun from using the said papers and documents seized as heretofore alleged as evidence against your deponent. The action also sought to compel the said defendants to return the said papers and documents to your deponent. Your deponent sought to obtain a preliminary injunction against the said Charles H. Tuttle and the said William J. Calhoun in the said action, and obtained an order from Mr. Justice Bondy, dated July 13, 1929, ordering the said Charles H. Tuttle and the said William J. Calhoun to show cause why they should not be so enjoined and why they should not be compelled to return the said papers and documents to your deponent. Subsequent to the time of the obtaining of this order to show cause by your deponent, the said Charles H. Tuttle and the said William J. Calhoun made a motion to dismiss the complaint in the equity action which your deponent had instituted. Pending the determination of the motion to dismiss, the hearing on the order to show cause was adjourned by consent.

The motion to dismiss came on before Judge Goddard, and in an opinion entered on the 16th day of August, 1929, he granted the motion to dismiss on the ground, as I am [fol. 11] informed by counsel and verily believe, that your deponent's proper remedy was by motion in a criminal proceeding instead of by independent suit.

Philip D. Gowen.

Sworn to before me this 21st day of August, 1929.
J. Cassin Healy, Notary Public, Westchester Co.
N. Y. Co. Clk's No. 593, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

In United States District Court

Affidavit of William Bartels in Support of Order to Show Cause

State of New York,
County of New York, ss:

William Bartels being duly sworn, deposes and says:

1. That he is one of the defendants in the within action.

[fol. 12] 2. That this motion is made for the purpose of obtaining an order directing the United States of America, the complainant herein, to restore to your deponent and to Philip D. Gowen and to Go-Bart Importing Co., Inc., certain papers and documents wrongfully seized from your deponent and the said Philip D. Gowen and the said Go-Bart Importing Company, Inc., and to prevent the use in evidence against your deponent and the said Philip D. Gowen and the said Go-Bart Importing Company, Inc., of these documents and papers.

3. That the facts upon which the motion is based, so far as the seizure of documents from your deponent is concerned, are as follows:

That for a long time prior to and on June 6, 1929, deponent was an officer of Go-Bart Importing Company, Inc., to wit, its Secretary-Treasurer. This Company is engaged in the business of importing, and has offices located at Room 1030, 200 Fifth Avenue, New York, N. Y., within the Southern District of New York.

That on the said 6th day of June, 1929, at about 10:00 A. M., while your deponent was engaged at his business in the offices of the said Go-Bart Importing Company, Inc., three men entered the offices of the said Go-Bart Importing Company, Inc., and stated that they were members of the Department of Justice of the United States Government. Two of these men your deponent later learned were named O'Brien and Collins and the third man is still unknown to your deponent. Your deponent requested that they state their business, and O'Brien stated that he had a search warrant to search the premises. O'Brien thereupon ex-[fol. 13] hibited a paper which he claimed was a search warrant and gave him a right to search. Your deponent

requested him to leave a copy of the said paper with your deponent, but he refused to do so. The three Government agents thereupon proceeded to search the premises. Neither your deponent nor anyone on behalf of your deponent nor anyone at the premises consented to such search, but on the contrary the search and seizure were strenuously objected to. The Government agents intimated, however, that if search and seizure were not consented to they would use force. After a search of the premises and of your deponent, the Government agents seized and took from the premises three memorandum books and miscellaneous slips of paper belonging to your deponent.

The agents gave no receipt for any of the papers or records taken from the premises or from your deponent.

After the said search and seizure your deponent was arrested and was arraigned on the said 6th day of June, 1929, before the United States Commissioner for the Southern District of New York and held to answer on a complaint of conspiracy to violate the National Prohibition Act, in bail in the sum of Ten Thousand Dollars.

4. Your deponent is informed and verily believes that the three Government agents were subordinates of William J. Calhoun, who, on information and belief, is Special Agent in Charge of Special Agents, Bureau of Prohibition, Treasury Department of the United States of America in charge of such agents operating in this the Southern District of New York.

[fol. 14] 5. Your deponent is further informed and believes that the aforesaid papers and documents were taken from the premises to the said office of the said William J. Calhoun, at Room 2, Sub-Treasury Building, Wall and Nassau Streets, New York, N. Y., where said William J. Calhoun and his subordinates, all of whom are Government agents and employees, have been going over the same, together with Charles H. Tuttle, and his subordinates. That the said Charles H. Tuttle is United States Attorney for the Southern District of New York.

6. Your deponent is further informed and verily believes, that the paper which O'Brien and the other Government agents described as a search warrant, was not a search warrant, but was in fact a warrant for the arrest of your de-

ponent and other persons; that said warrant was directed to the Marshal for the Southern District of New York and to his deputies. Your deponent has annexed a copy of said warrant issued by United States Commissioner Garrett W. Cotter to these motion papers as Exhibit A.

7. Your deponent is further informed and verily believes that neither the Marshal nor any of his deputies, nor any person deputized by the Marshal for the purpose of executing said warrant, was present at the time said warrant was taken to Room 1030, 200 Fifth Avenue, where your deponent was placed under arrest.

8. Your deponent is further informed and verily believes that said warrant for the arrest of your deponent and for [fol. 15] the arrest of others, hereto annexed as Exhibit A, was never recorded or delivered to the United States Marshal prior to the time of your deponent's arrest, and that it was in fact delivered to William J. Calhoun and/or one or more of his assistants, such as agents O'Brien and Collins; and that the arrest of your deponent was illegal and in violation of his rights under the Constitution of the United States.

9. Your deponent is further informed by counsel and verily believes that there is a second reason why the arrest of your deponent and the search and seizure of his property was illegal, to wit, that the complaint filed before the United States Commissioner by William J. Calhoun, a copy of which is hereto annexed as Exhibit B, is insufficient in law in that it does not sufficiently state the crime with which your deponent is accused, and in that it is based on information and belief without disclosing the sources of such information and belief, and that it does not set forth facts showing that any crime is committed. For these reasons your deponent believes that the warrant issued by the United States Commissioner upon this complaint was improperly issued and void and of no effect, and, therefore, that the arrest of your deponent was illegal and the search and seizure of your deponent's property was illegal and improper.

10. Your deponent is informed by counsel and verily believes that the records of your deponent have been used and are now being used by the said William J. Calhoun and

the said Charles H. Tuttle and their subordinates, and by [fol. 16] other officers and agents of the United States for the purpose of securing further evidence against your deponent, and also for presentation to the Grand Jury.

11. Your deponent further contends that his arrest and the search and seizure of his personal effects and records was illegal, in violation of his constitutional rights, and more particularly in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America.

12. Your deponent further states that irremediable harm will occur to him if the alleged use of the said papers and documents by the Government is permitted to continue.

13. In view of these facts, it is respectfully requested that an order issue directing the complainant to return forthwith to your deponent, all papers and documents of your deponent which are in the possession of or under the control of the complainant as heretofore alleged, and further enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction, and each and every one of them and all in privity with them, from directly or indirectly using as evidence the papers and documents seized from your deponent as heretofore alleged, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies, or reproductions made of such papers and documents.

[fol. 17] 14. The reason why this application is made by order to show cause instead of by notice of motion, is that your deponent is desirous of preventing the alleged use of the said papers and documents as evidence by the complainant pending the determination of this motion.

That no previous application for this or any similar relief has been made to any court or judge thereof, except that your deponent commenced a suit in equity against Charles H. Tuttle, individually, and as United States Attorney for the Southern District of New York, and William J. Calhoun, individually and as Special Agent in Charge of Special Agents of the Bureau of Prohibition, Treasury Department of the United States of America, and sought

to enjoin the said Charles H. Tuttle and the said William J. Calhoun from using the said papers and documents seized as heretofore alleged as evidence against your deponent. The action also sought to compel the said defendants to return the said papers and documents to your deponent. Your deponent sought to obtain a preliminary injunction against the said Charles H. Tuttle and the said William J. Calhoun in the said action, and obtained an order from Mr. Justice Bondy, dated July 13, 1929, ordering the said Charles H. Tuttle and the said William J. Calhoun to show cause why they should not be so enjoined and why they should not be compelled to return the said papers and documents to your deponent. Subsequent to the time of the obtaining of this order to show cause by your deponent, the said Charles H. Tuttle and the said William J. Calhoun made a motion to dismiss the complaint in the equity ac- [fol. 18] tion which your deponent had instituted. Pending the determination of the motion to dismiss, the hearing on the order to show cause was adjourned by consent.

The motion to dismiss came on before Judge Goddard, and in an opinion entered on the 16th day of August, 1929, he granted the motion to dismiss on the ground, as I am informed by counsel and verily believe, that your deponent's proper remedy was by motion in a criminal proceeding instead of by an independent suit.

William Bartels.

Sworn to before me this 21st day of August, 1929. J. Cassin Healy, Notary Public, Westchester Co., N. Y. Co. Clk's No. 503, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

[fol. 19] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WILLIAM BARTELS AS SECRETARY-TREASURER OF GO-BART IMPORTING COMPANY, INC., IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York, ss:

William Bartels being duly sworn, deposes and says:

1. That now and at all the times hereinafter mentioned, he was and is the Secretary-Treasurer of Go-Bart Importing Company, Inc., the petitioner herein.

2. That this motion is made for the purpose of obtaining an order directing the United States of America, the complainant herein, to restore to the Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, certain papers and documents wrongfully seized from the Go-Bart Importing Company, Inc, the said Philip D. Gowen, and the said William Bartels, and to prevent the use in evidence against the said Go-Bart Importing Company, Inc., the said Philip D. Gowen, and the said William Bartels, of these documents and papers.

[fol. 20] 3. That the facts upon which the motion is based, so far as the seizure of documents from the said Go-Bart Importing Company, Inc., is concerned, are as follows:

That for a long time prior to and on June 6, 1929, deponent was an officer of the said Go-Bart Importing Company, Inc., to wit, its Secretary-Treasurer. The said Go-Bart Importing Company, Inc., is engaged in the business of importing and has offices located at Room 1030, 200 Fifth Avenue, New York, N. Y., within the Southern District of New York.

That on the said 6th day of June, 1929, at about 10:00 A. M., while your deponent was engaged at his business in the offices of said Go-Bart Importing Company, Inc., at the aforesaid Room 1030, 200 Fifth Avenue, New York, N. Y., within the Southern District of New York, three men entered the office of said Go-Bart Importing Company, Inc., and stated that they were members of the Department of Justice of the United States Government. Two of these men your deponent later learned were named O'Brien and Collins, and the third man is still unknown to your deponent. Your deponent requested that they state their business, and O'Brien stated that he had a search warrant to search the premises. O'Brien thereupon exhibited a paper which he claimed was a search warrant and gave him a right to search. Your deponent requested him to leave a copy of the said paper with your deponent, but he refused to do so. Neither your deponent, nor any one else on behalf of the said Go-Bart Importing Company, Inc., nor any one at the premises consented to such search, but [fol. 21] on the contrary the search and seizure were strenuously objected to.

The said government agents then proceeded to search the premises, and ransacked and searched a safe belonging to the said Go-Bart Importing Company, Inc., letter files of said Go-Bart Importing Company, Inc., and three desks on the premises belonging to the said Go-Bart Importing Company, Inc., and used by the various employees of the said Go-Bart Importing Company, Inc. After this search, the agents removed from the premises papers, documents and property belonging to the said Go-Bart Importing Company, Inc., including journals, account books, letter files, insurance policies, cancelled checks, index cards, and other miscellaneous property. It is impossible to give an exact list of the property removed because the agents gave no receipt for any of the papers or records taken from the premises.

After the said search and seizure, your deponent and one George Heath, an employee of said Go-Bart Importing Company, Inc., who was present during the said search and seizure, and one Philip D. Gowen, the President of said Go-Bart Importing Company, Inc., and one Ray Gardner, an employee of said Go-Bart Importing Company, Inc., who entered the premises while said search was in progress, were arrested and arraigned on the said 6th day of June, 1929, before the United States Commissioner for the Southern District of New York, and held to answer in bail on a complaint of conspiracy to violate the National Prohibition Act.

That your deponent, and the said George Heath, and the [fol. 22] said Philip Gowen, and the said Ray Gardner were the only employees and/or officers of said Go-Bart Importing Company, Inc., who were arrested at said premises.

4. Your deponent is informed and verily believes that the three government agents were subordinates of William J. Calhoun, who, on information and belief, is Special Agent in Charge of Special Agents, Bureau of Prohibition, Treasury Department of the United States of America in charge of such agents operating in this the Southern District of New York.

5. Your deponent is further informed and believes that the aforesaid papers and documents were taken from the premises to the said office of said William J. Calhoun, at

Room 2, Subtreasury Building, Wall and Nassau Streets, New York, N. Y., where said William J. Calhoun and his subordinates, all of whom are government agents and employees, have been going over the same, together with Charles H. Tuttle, and his subordinates. That the said Charles H. Tuttle is United States Attorney for the Southern District of New York.

6. Your deponent is further informed and verily believes that the paper which O'Brien and the other government agents described as a search warrant, was not a search warrant, but was in fact a warrant for the arrest of your deponent and the said George Heath and the said Philip D. Gowen and the said Ray Gardner. The said warrant was directed to the Marshal for the Southern District of New York and to his deputies. Your deponent has an- [fol. 23] nexed a copy of said warrant, issued by United States Commissioner Garrett W. Cotter, to these motion papers as Exhibit A.

7. Your deponent is further informed and verily believes that neither the Marshall nor any of his deputies, nor any person deputized by the Marshal for the purpose of executing said warrant, was present at the time said warrant was taken to Room 1030, 200 Fifth Avenue, New York, N. Y., where your deponent and the said George Heath and the said Philip D. Gowen and the said Ray Gardiner were placed under arrest.

8. Your deponent is further informed and verily believes that said warrant for the arrest of your deponent and the said George Heath and the said Philip D. Gowen and the said Ray Gardner, hereto annexed as Exhibit A, was never recorded or delivered to the United States Marshal prior to the time of said arrests, and that it was in fact delivered to William H. Calhoun and/or one or more of his assistants, such as agents O'Brien and Collins; and that the arrests of your deponent and of the said George Heath and of the said Philip D. Gowen and of the said Ray Gardiner were in violation of their rights under the Constitution of the United States.

9. Your deponent is further informed by counsel and verily believes that there is a second reason why the arrests of your deponent and of the said George Heath and

of the said Philip D. Gowen and of the said Ray Gardner and the search and seizure of Go-Bart Importing Com-
[fol. 24] pany, Inc., property were illegal, to wit, that the complaint filed before the United States Commissioner by William J. Calhoun, a copy of which is hereto annexed as Exhibit B, is insufficient in law in that it does not sufficiently state the crime with which your dependent and/or the said George Heath and/or the said Philip D. Gowen and/or the said Ray Gardner are accused, and in that it is based on information and belief without disclosing the sources of such information and belief, and that it does not set forth facts showing that any crime was committed. For these reasons your deponent believes that the warrant issued by the United States Commissioner upon this complaint was improperly issued and void and of no effect, and, therefore, that the arrests of your deponent and the said George Heath and the said Philip D. Gowen and the said Ray Gardner were illegal, and the search and seizure of said Go-Bart Importing Company, Inc., property were illegal and improper.

10. Your deponent is informed by counsel and verily believes that the records of the said Go-Bart Importing Company, Inc., have been used and are now being used by the said William J. Calhoun and the said Charles H. Tuttle and their subordinates, and by other officers and agents of the United States, for the purpose of securing further evidence against the complainant, and also for presentation to the Grand Jury.

11. The said Go-Bart Importing Company, Inc., further contends that the search and seizure of its records, documents and papers as aforesaid, was illegal, in violation of its constitutional rights and more particularly in viola-
[fol. 25] tion of the Fourth and Fifth Amendments to the Constitution of the United States of America.

12. The said Go-Bart Importing Company, Inc., states that irremediable harm will occur to it if the alleged use of the said papers and documents by the complainant is permitted to continue.

13. In view of these facts, it is respectfully requested that an order issue directing the complainant to return forthwith to said Go-Bart Importing Co., Inc., all papers

and documents of said Go-Bart Importing Company, Inc., which are in the possession of or under the control of the complainant as heretofore alleged, and further enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction, and each and every one of them and all in privity with them, from directly or indirectly using as evidence the papers and documents seized from said Go-Bart Importing Company, Inc., as heretofore alleged, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies, or reproductions made of such papers and documents.

14. The reason why this application is made by order to show cause instead of by notice of motion, is that said Go-Bart Importing Company, Inc., is desirous of preventing the alleged use of the said papers and documents as evi- [fol. 26] dence by the complainant pending the determination of this motion.

That no previous application for this or any similar relief has been made to any court or judge thereof, except that said Go-Bart Importing Company, Inc., commenced a suit in equity against Charles H. Tuttle, individually and as United States Attorney for the Southern District of New York, and William J. Calhoun, individually and as Special Agent in Charge of Special Agents of the Bureau of Prohibition, Treasury Department of the United States of America, and sought to enjoin the said Charles H. Tuttle and the said William J. Calhoun from using the said papers and documents seized as heretofore alleged as evidence against said Go-Bart Importing Company, Inc. The action also sought to compel the said defendants to return the said papers and documents to said Go-Bart Importing Company, Inc. Said Go-Bart Importing Company, Inc., sought to obtain a preliminary injunction against the said Charles H. Tuttle and the said William J. Calhoun in the said action, and obtain an order from Mr. Justice Bondy, dated July 13, 1929, ordering the said Charles H. Tuttle and the said William J. Calhoun to show cause why they should not be so enjoined and why they should not be compelled to return the said papers and

documents to said Go-Bart Importing Company, Inc. Subsequent to the time of the obtaining of this order to show cause by said Go-Bart Importing Company, Inc., the said Charles H. Tuttle and the said William J. Calhoun made a motion to dismiss the complaint in the equity action which said Go-Bart Importing Company, Inc., had [fol. 27] instituted. Pending the determination of the motion to dismiss, the hearing on the order to show cause was adjourned by consent.

The motion to dismiss came on before Judge Goddard and in an opinion entered on the 16th day of August, 1929, he granted the motion to dismiss on the ground, as I am informed by counsel and verily believe, that said Go-Bart Importing Company's, Inc., proper remedy was by motion in a criminal proceeding instead of by an independent suit.

William Bartels.

Sworn to before me this 21st day of August, 1929. J. Cassin Healy, Notary Public, Westchester Co. N. Y. Co. Clk's No. 593, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

[fol. 28] Warrant of Arrest, Annexed as Exhibit "A", in Support of Order to Show Cause

Exhibit "A"

The President of the United States of America to the Marshal of the United States for the Southern District of New York and to his Deputies, or any or either of them:

Whereas, complaint on oath has been made to me, charging that Philip D. Gowen, alias "Slater", alias "Watts", Royal C. Gardiner, William Bartels, Patrick Smith, alias "Paddy", George Heath, John Howley, Count Francis de Polignac, Joseph M. Dooley, William Dooley, Ray Gardiner, John B. Hobby, "James" Most, Chris Inteman, Arthur D. M. Cooly, George Levy, Joseph P. Stinard, Fred Schultz, "John" Moore, alias "Dinty", George Flynn, alias "The Judge", Charles Girassi, John Martinez, alias "Martini", Max A. Gants, Arthur Mack, "Abraham" Spiegel, Louis "Brown", Samuel "Smith", Yonkel "Levy", Nathaniel Johnson, Moses Lesser, Tony Frank, James "Jones", Robert Nelson, "Joseph" Girard,

"Louis" Ruck, Fred Dohlander, "John Doe", "Richard Roe", did from the 1st day of January, 1929 to the 5th day of June in the year one thousand nine hundred and twenty nine at the Southern District of New York unlawfully, wilfully and knowingly combine, conspire, confederate and agree to commit an offense against the United States, namely to possess, barter, sell and deliver intoxicating liquor containing more than one half of one per cent. of alcohol by volume for use for beverage purposes, in violation of the Act of Congress approved October 28, 1918, [fol. 29] known as the National Prohibition Act and the United States Criminal Code, Section 37, as set forth in the Complaint this day filed in the office, a certified copy of which is hereto annexed, and made a part hereof, against the peace of the United States and their dignity, and against the form of the statute of the United States in such case made and provided.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said persons above named and described and bring their bodies forthwith before me, or some Judge or Justice of the United States wherever in the Southern District of New York they may be found that they may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 5th day of June, in the year of our Lord one thousand nine hundred and twenty nine.

Garrett W. Cotter, United States Commissioner for the Southern District of New York. (Seal.)

[fol. 30] COMPLAINT, ANNEXED AS EXHIBIT "B", IN SUPPORT OF ORDER TO SHOW CAUSE

Exhibit "B"

Approved: James Hendrick Terry, Assistant United States Attorney.

Before Hon. Garrett W. Cotter

[Title omitted]

SOUTHERN DISTRICT OF NEW YORK, ss:

William J. Calhoun, being duly sworn, deposes and says, that he is Special Agent in charge of Special Agents, Bu-

[fol. 31] reau of Prohibition, Treasury Department of the United States, and charged with the duties of enforcing the Act of Congress approved October 28, 1919, known as the "National Prohibition Act", and upon information and belief alleges:

That heretofore, to wit, beginning on January 1, 1929, and continuing on each and every day thereafter down to and including the date of the filing of this complaint at the City, County, State, and Southern District of New York, and within the jurisdiction of this court, Philip D. Gowen, alias "Slater", alias "Watts", Royal C. Gardiner, William Bartels, Patrick Smith, alias "Paddy", George Heath, John Howley, Count Francis de Polignac, Joseph M. Dooley, William Dooley, Ray Gardiner, John B. Hobby, "James" Most, first name fictitious, Chris Inteman, Arthur D. M. Cooley, George Levy, Joseph P. Stinard, Fred Schultz, "John" Moore, alias "Dinty", first name fictitious, George Flynn, alias "The Judge", Charles Girassi, John Martinez, alias "Martini" Max A. Gants, Arthur Mack, "Abraham" Spiegel, first name fictitious, Louis "Brown", last name fictitious, Samuel "Smith", last name fictitious, Yonkel "Levy", last name fictitious, Nathaniel Johnson, Moses Lesser, Tony Frank, James "Jones", last name fictitious, Robert Nelson, "Joseph" Girard, first name fictitious, "Louis" Ruck, first name fictitious, Fred Bohlander, "John Doe", full name fictitious, "Richard Roe", full name fictitious, hereinafter called the defendants, did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together and among themselves and with divers other persons to your deponent unknown to commit a nuisance against the United States, [fol. 32] that is to say, to unlawfully, willingly, and knowingly possess, import, export, transport, barter, sell, furnish, deliver, solicit, and receive orders for intoxicating liquor containing more than one half of one percent. of alcohol, and fit and intended for use for beverage purposes in violation of and in a manner otherwise than as authorized by the Act of Congress approved October 28, 1919, commonly known as the National Prohibition Act and the acts amendatory thereof and supplemental thereto and the rules and regulations made pursuant thereto.

Overt Act

In pursuance of said conspiracy and to effect the objects thereof, on the 23rd day of May, 1929, the defendant, George Heath purchased one Peerless automobile.

Against the peace of the United States and their dignity and contrary to the form of the Statutes of the United States in such case made and provided (Section 37, U. S. C. C. Act of Congress, approved October 29, 1919, commonly known as the National Prohibition Act.)

(Signed) William J. Calhoun.

Sworn to before me this 5th day of June, 1929.
Garrett W. Cotter, United States Commissioner, S. D. N. Y.

[fol. 33] In United States District Court

Affidavit of Ernest Braidwood in Opposition to Order to Show Cause

State of New York,
County of New York,
Southern District of New York, ss:

Ernest Braidwood, being duly sworn, deposes and says:

I am a citizen of the United States and reside at an address which is in the possession of the United States Attorney's Office for the Southern District of New York.

Sometime in the month of March, 1927, I first became acquainted with the activities of the Go-Bart Importing Co., Inc., the office of which is located in Room 1030 of the premises 200 Fifth Avenue, City, County, State and Southern District of New York. This company had offices in a suite of three rooms, in which there were a safe, a large steel cabinet, a table and chairs and some other office furniture. I went to the aforesaid premises after being introduced over the telephone by a third person to a man named Philip D. Gowen, for the purpose of giving orders for, and purchasing and securing the delivery of intoxicating liquors. In the said premises of the Go-Bart Importing Co., [fol. 34] Inc., I met Philip D. Gowen and had a conversa-

tion with him regarding the possibility of buying intoxicating liquors. Philip D. Gowen introduced me to William Bartels at this time and told me that Bartels was his partner and that any time I wanted to order any liquor I could give orders for the same to William Bartels as well as to himself. In the course of the conversation, Gowen told me that they did not keep much liquor on the premises except odd lots or broken cases of liquor. Gowen took a bottle of Teachers Highland Cream Scotch Whiskey from the safe in one of the rooms of the suite in Room 1030 and gave me a drink of it as a sample. I am familiar with the color, taste and smell of intoxicating liquor and I know the liquid I tasted was whiskey and an intoxicating liquor containing more than one-half of one percentum of alcohol by volume and fit for use for beverage purposes. I then gave Gowen my order for one case of Teachers Highland Cream Scotch Whiskey and one case of Burke's Gin. I paid Gowen $125.00 in cash, $70.00 for the Scotch Whiskey and $55.00 for the Gin. I later had occasion to taste the whiskey and gin that I ordered from Gowen and being familiar with the taste of intoxicating liquors I know that I received whiskey and gin as represented.

After I gave the order, Gowen telephoned someone and then told me to go to a machine shop located in the basement of premises 26 East 22nd Street, City, County, State and Southern District of New York, where a man named "Willie", whose last name I later found to be Duckett, would be there to take care of me. I went over to this shop and "Willie" met me at the entrance and gave me two [fol. 35] packages which I took away with me, and which I later found to contain the whiskey and gin purchased by me from Gowen.

After this first transaction with Gowen and Bartels and the Go-Bart Importing Co., Inc., I continued my liquor dealings with them and with several others whom I shall hereinafter mention. My relationship extended over a period of eighteen months, during which time I gave at least forty orders for intoxicating liquor, which orders were filled and delivered and made payment for the same. I visited the aforesaid premises 200 Fifth Avenue on an average of twice a week.

I placed my orders for intoxicating liquor sometimes by telephoning the Go-Bart Importing Company, Inc., at their

listed telephone number, to wit, Gramercy 5978, and sometimes by going up to their office at 200 Fifth Avenue, above mentioned, and giving it in person. When I telephoned my orders for liquor, I adopted the name "Burke" because on the occasion of my first purchase of liquor, Philip D. Gowen told me to use the name "Burke" instead of my real name when I wanted to give any orders over the telephone. On the occasions when I telephoned my orders, I telephoned Gramercy 5978 and usually gave the order for liquor to Philip Gowen. I also have given my orders for intoxicating liquors over the aforesaid telephone to William Bartels, to George Heath and a couple of times to Roy Gardiner alias Charles Cramer. I know all of these men and have talked to them on many occasions both in person and over the telephone and have heard their voices over the telephone Gramercy 5978, and know that the persons I have named have [fol. 36] taken my orders for intoxicating liquors over the aforesaid telephone. The orders so given were later delivered and payment made for the same.

Whenever I called on the telephone and spoke to any of the aforementioned individuals, I inquired whether the price was the same for any order of intoxicating liquor that I gave them and whoever I happened to be speaking to at the time would tell me if there was any change. The various liquors I purchased and ordered from this group of individuals and the prices for the same are as follows: John Haig Scotch Whiskey, $75.00 a case, and later Haig and Haig Scotch Whiskey, $90.00 a case; Gin, between $42.00 a case up to $65.00 a case for House of Lord's Gin; Champagne, $90.00 a case for Pommery & Greno, Monopole and Lanson; Wines such as Burgundy, Port, Sherry and Sauterne, at $48.00 a case; Cordials, such as Benedictine, Chartreuse, Cointreau, at $96.00 a case; and Hennessy Brandy, at $96.00 a case. Most of my purchases were Scotch Whiskies but I have purchased some of the aforementioned and other liquors during the period of my dealings with the aforementioned individuals.

When I telephoned and spoke to either Gowen, Bartels, Heath, or Gardiner, I used the name of "Burke" and then gave my order for the particular liquor I wanted and asked about the price. Then whoever I happened to be speaking

to at the time would give me the desired price information and tell me when they would have the order ready to be taken away. Then I would go up to the premises of the Go-Bart Importing Co., Inc., at 200 Fifth Avenue. Sometimes my package or packages would be there for me to [fol. 37] pick up. On some occasions I would wait a few minutes and George Heath would bring in my packages from outside. On other occasions, William Bartels or Philip Gowen, whoever happened to be in the office, would tell me to go over to the machine shop previously mentioned as being located at 26 East 22nd Street, City, County, State and Southern District of New York. I have been in these premises on several occasions at such times when Gowen told George Heath to take me over to the shop to get my order of liquor packed or delivered. The shop is used for experimental and repair work on power sewing machines. In the rear of the shop there is a room partitioned off and about the size of large sized butcher's ice box, in which intoxicating liquor was stored and kept under lock and key. The shop is maintained by one Tony, whose last name I do not know, a man about forty-five years of age, weighing about 150 pounds, about 5 feet 8 inches tall and of German, Norwegian or Swedish extraction. On one of my several visits when George Heath took me over to these premises and opened the door to the rear room, I was given a drink from a bottle of Gilbey's Gin, which George Heath told me was for Tony's use. I have seen as many as twenty-five cases of various kinds of intoxicating liquors in that rear room. The liquor I was given to drink by Heath was gin. I also saw several broken bottles and from the smell of the contents, I know that the liquids therein contained were intoxicating liquors. When I went over to these premises, I sometimes helped George Heath pack up my order and he would then help me out into the street with it and sometimes Heath helped me put it into a taxi.

[fol. 38] On the occasions when I went up to the 200 Fifth Avenue office I usually gave my orders for intoxicating liquors to William Bartels or Philip D. Gowen. Sometimes during the noon hour, these men were out and then I would give my orders to George Heath. On one occasion at least I gave an order for Rye Whiskey to Roy Gardiner. Pay-

ments for the intoxicating liquor were usually made by me to Philip D. Gowen, in cash. He instructed me not to take checks or to give him checks because as he put it "checks" send men to Atlanta".

During my visits to the Go-Bart Importing Co., I have seen Roy Gardiner in the premises about ten or a dozen times. We usually discussed matters with Bartels and Gowen. I recollect that sometime in August or September of 1928, I had a conversation in the 200 Fifth Avenue premises with Gardiner about liquor and I told him he did not know good liquor. He told me he had formerly been a Deputy Collector of Internal Revenue and that he had been in the game longer than I had been. He told me that he had supervised rum running in Rum Row during the early days of Prohibtion and told how he used to meet the captains and liquor brokers in the Hotel McAlpin and how he had acted as pay-off man. He then proceeded to give me advice on how to work in the liquor racket. He told me a good way to work was to give my customers self addressed envelopes in a fictitious name addressed in care of the Go-Bart Importing Co., Inc., and that they would hold my mail until I came in. Then I could open the envelope and get my checks and they would see that the bank downstairs in the [fol. 39] building would cash them. He told me he himself used the name of "Charles Cramer" and had his name so addressed on the envelopes of his customers and that he put it through the bank downstairs. Gardiner also told me that as part of his present activity, he located liquor that was available for purchase and that he informed Gowen or Bartels about such liquors.

During the month of September, 1928, I recollect Gardiner and Gowen looking over a liquor trade journal from abroad, which journal contained price lists, and announcements of auction sales of liquor. I heard Gowen say there was a good liquor buy and Gardiner replied "We'll have to get (naming someone whose name I do not recollect at this time) to buy it up".

On another occasion during the same month I went up to the Go-Bart Importing Co., Inc., to give a large order for intoxicating liquor. I spoke to Gowen and asked about some rye whiskey. We were interrupted by a phone call for Gowen. Gowen turned to Roy Gardiner who was present at

the time and told Gardiner to tell me about the rye. Roy Gardiner then told me that he could get me some 1913 Overholt Rye Whiskey at about $160.00 a case and that he could furnish me with about five cases a week. Although I was ordering eleven cases of assorted liquors, I told him I could and would take one case of rye whiskey. I later received this case of rye whiskey in the shipment of the order which I gave to Philip D. Gowen.

After I had given the complete order, Philip D. Gowen told me to meet George Heath and make the arrangements for delivery with him. I spoke to George Heath and he gave me a slip of paper bearing the address Avenue P and [fol. 40] 13th Street, Brooklyn, New York, and a telephone number Sloeum 3610, which is the listed telephone number of William Bartels. Heath told me to meet him at the address and if he was delayed or for any reason he did not get there within a reasonable time, I should call the phone number I had on the slip of paper for further instructions. I drove over the place mentioned and later met George Heath, who drove up in an Oakland Coupe. I left my car and went into his car and we drove over to some private residence located on East 13th Street between Avenue O and Avenue P, Brooklyn, New York. We backed into the alleyway and went into the cellar of the premises. George Heath immediately went to several parts of the cellar and manipulated something. I asked him what he was fooling around with and he said he was "tripping" the burglar alarms because he had been down there one night and forgot to do it, and as a result, Phil Gowen and a cop had come running over to the place.

The Oakland Coupe which George Heath drove up to the premises contained part of my eleven case order and we loaded the rest of the order from the cellar of this private residence. I saw some of the shipment and order in a compartment in the rear of the car. The rear part of the car had been cut out and a new bottom of sheet metal put in. I told him I did not think the rear of the car would hold my order. He told me that eighteen cases would fit inside of it. After picking up the load, we went to premises at Fifth Avenue near 10th Street, City, County, State and Southern District of New York, where we delivered the entire order. [fol. 41] Later in the same day, I paid for my order in cash by paying William Bartels.

On or about the month of April or May, 1927, during my early visits to the Go-Bart Importing Co., Inc., I remarked to Gowen that he kept books very well. He then told me that piror to Prohibition he had been connected with the wholesale house for the Pommery Champagne people and that when they gave up business with the advent of Prohibition he and William Bartels got together and organized and formed the Go-Bart Importing Co., Inc., and took over the former customers of the champagne concern. He said they had been operating since that time. William Bartels who was present at this time said he had been a credit man for some liquor outfits.

On two occasions at least, I saw a man who I now recognize from pictures published in the newspapers as the Count de Polignac in the premises of the Go-Bart Importing Co., Inc. On these occasions he spoke to William Bartels and Philip D. Gowen but I could not hear their conversation. I have heard Bartels and Gowen in conversation refer to the "Count" but I do not know whether it is the same man that I saw in the premises.

In June, 1928, Gowen, Bartels and Gardiner discussed with me the rates of duties on the importation of the lowest grade of earthenware from Europe. They approached me because they knew I had a knowledge of customs matters. I looked it up and gave them the rates. They then told me they were going to import low grade eathenware which they would later throw away. They said they would import liquor and would throw the earthenware away after taking out the liquor hidden in them. They also inquired how [fol. 42] merchandise was selected for the public stores. I told them it was a great risk all around because there might be breakage and leakage and the scheme would be uncovered. I also told them it would be impossible to fool everyone along the line. They said they would take care of that.

During the course of my visits at the premises of the Go-Bart Importing Co., Inc., I have seen "Judge" Flynn on the premises about ten times, especially during the noon hour. I heard him most often referred to as "Judge" although on a few occasions he was called Flynn. In July 1928, on two or three occasions, Gowen and Bartels wrapped up a bottle or two of liquor for him. Once I heard him ask George Heath about a delivery of liquor to the

Metropolitan Club, stating that "Hilt" was quite anxious because he had a party on that night. George Heath said that he would get the delivery there in time. On another occasion, Judge Flynn told me that the only way to make money in the liquor racket was to do it on a large scale like Phil Gowen was doing it.

On or about April 15th, 1929, I went down to the Sub-Treasury Building, in the City, County, State and Southern District of New York, and went in Room No. 1 and met William J. Calhoun, Special Agent in Charge of Special Agents of the Bureau of Prohibition and outlined and recited to him these same facts and subject matter herein contained.

Ernest S. Braidwood.

Sworn to before me this 24th day of October, 1929.
Garrett W. Cotter, U. S. Commissioner, Southern District of New York. (Seal.)

[fol. 43] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WILLIAM J. CALHOUN IN OPPOSITION TO ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

William J. Calhoun, being duly sworn, deposes and says:

That he is the Federal Prohibition Administrator for the Administrative District of New Jersey and is an officer and employee of the Treasury Department of the United States.

That for some two years prior to June 6, 1929, he was the Special Agent in Charge of Special Agents of the Bureau of Prohibition of the Treasury Department of the United States assigned to New York City.

That he was and is in charge of the investigation of the case of United States v. Go-Bart Importing Company, Inc., Philip Gowen, William Bartels, and others.

That he has read the affidavit of Ernest S. Braidwood attached hereto and is familiar with its contents. That

prior to June 6, 1929, the said Ernest Braidwood had per-
[fol. 44] sonally related to deponent all of the facts set forth in the attached affidavit save the exact street address given in the affidavit as 26 East 22nd Street, New York City, and had in addition to these oral reports made written statements for deponent setting forth the same facts. That deponent had made and caused to be made independent investigations which corroborated in every particular the facts set forth in the attached affidavit of Ernest Braidwood and related by Ernest Braidwood to deponent prior to June 6, 1929.

The sources of these independent investigations being official investigations conducted by deponent cannot here be disclosed consistently with public justice.

That prior to June 6, 1929, deponent had further related the facts set forth in the attached affidavit of Ernest Braidwood to his subordinate officer Eugene O'Brien, who is also an officer and employee of the Bureau of Prohibition of the Treasury Department of the United States of America.

That from the aforesaid statements of Ernest Braidwood and from the independent and corroborative investigations made and caused to be made by deponent, deponent knew that a conspiracy and agreement between more than two persons to violate the laws of the United States by unlawfully and without permit importing, transporting, selling, delivering, and otherwise dealing in whiskies and other intoxicating liquors containing more than one-half of one percentum of alcohol by volume and fit and intended for use for beverage purposes, had theretofore in 1928 and 1929 been entered into and overt acts performed in furtherance thereof within the Southern District of New York, [fol. 45] and verily believed and now believe that the aforementioned Philip Gowen, William Bartels and the Go-Bart Importing Company, Inc., and each of them, had knowingly been a party to and joined in the aforementioned agreement and conspiracy and had participated in the commission of the aforesaid felony. That deponent communicated this belief together with the statement of all the facts previous mentioned herein and in the attached affidavit of Ernest Braidwood to the said Eugene O'Brien before the 6th day of June, 1929, and assigned the said Eugene O'Brien

to the further investigation of the criminal case of the Go-Bart Importing Co., Inc., et al.

William J. Calhoun.

Sworn to before me this 25th day of October, 1929. Augustus L. Friedmann, United States Commissioner. (Seal.)

[fol. 46] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF EUGENE R. O'BRIEN IN OPPOSITION TO ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Eugene R. O'Brien, being duly sworn, deposes and says: That he is a duly appointed and commissioned agent and employee of the Commissioner of Prohibition of the Bureau of Prohibition and an officer of the Treasury Department of the United States of America, charged with the duties of enforcing the laws of the United States pertaining to narcotics and intoxicating liquors. That he has been such an officer continuously for a period of approximately two years heretofore.

That he has read the affidavit of Ernest S. Braidwood, attached hereto, and is familiar with its contents. That he has also read the affidavit of William J. Calhoun, attached hereto, and is familiar with its contents. That prior to June 6, 1929, the said William J. Calhoun personally related to deponent the facts set forth in the attached affidavit of Ernest S. Braidwood save the exact street address [fol. 47] given in the affidavit as 26 East 22nd Street, New York City. The said facts set forth in the attached affidavit of Ernest S. Braidwood are, exclusive of the address 26 East 22nd Street, New York City, specifically included herein by reference, with the same effect as though here set forth at length. That the said William J. Calhoun, who was the superior officer of deponent on and prior to June 6, 1929, further stated to deponent that he had made an

independent investigation of the facts set forth in the attached affidavit of Ernest S. Braidwood and that the result of his investigation was to corroborate and to confirm the facts related to him by Braidwood. That the said William J. Calhoun prior to June 6, 1929, had furthermore described in detail to deponent the offices occupied by the Go-Bart Importing Company, Inc., Philip Gowen and William Bartels, and had furthermore described to deponent the personal appearance of both Gowen and Bartels. That the said William J. Calhoun had furthermore informed deponent that the Go-Bart Importing Company, Inc., Philip Gowen and William Bartels, together with others, had theretofore committed the crime of conspiring to violate the laws of the United States by the unlawful importation, sale and delivery of intoxicating liquors for beverage purposes. That from the aforesaid statements of William J. Calhoun, deponent was of the belief before June 6, 1929, that the Go-Bart Importing Company, Inc., Philip Gowen, William Bartels, and a number of other individuals, had in fact committed the felony of conspiring to violate the laws of the United States pertaining to intoxicating liquors.

[fol. 48] That on June 6, 1929, deponent furthermore saw a formal complaint filed with the United States Commissioner for the Southern District of New York and signed by William J. Calhoun, with whose signature deponent is familiar, charging the above-named individuals together with a large number of others, with the crime of conspiring to violate the laws of the United States. Deponent took a certified copy of the said complaint to which was attached a certified copy of a warrant of arrest issued for all defendants in the said complaint for the purpose of reference as to the names of the various defendants.

That thereafter and on June 6, 1929, deponent, in company with two other brother officers, went to premises known as 200 Fifth Avenue, in the City, State and Southern District of New York, and there proceeded to suite 1030. Deponent entered the said suite which consisted of three rooms occupied as offices and fitted up with regular office furniture including chairs, desks, file cabinets and a safe. In the said premises deponent found the defendant William Bartels and shortly thereafter the defendant Philip Gowen.

Deponent stated to them that he was an officer of the United States and placed them under arrest for the commission of the felony hereinbefore described. That the arrests of the aforementioned defendants Philip Gowen and William Bartels were in each instance made by deponent upon the ground and for the reason that a conspiracy and agreement between more than two persons to violate the laws of the United States by unlawfully and without permit importing, transporting, selling, delivering and otherwise dealing [fol. 49] in whiskies and other intoxicating liquors containing more than one-half of one per cent. of alcohol by volume and fit and intended for use for beverage purposes had theretofore in 1928 and 1929 been entered into, and overt acts performed in furtherance thereof, within the Southern District of New York, and before the said arrests I was in possession of detailed information given to me by my superior officer William J. Calhoun which I then believed and now believe to be credible and reasonable that the aforementioned defendants Philip Gowen and William Bartels and each of them, had knowingly been a party to and joined in the aforementioned agreement and conspiracy and had participated in the commission of the aforesaid felony.

That at no time did deponent serve or attempt to serve or execute any warrant of arrest or search warrant upon the said Philip Gowen or William Bartels, nor did either of the officers accompanying deponent do so. That deponent never made any return or any purported return upon any warrant or paper of any sort purporting to be a warrant of arrest or search in connection with his apprehension of the above mentioned Philip Gowen and William Bartels.

That after the arrests of Philip Gowen and William Bartels, as aforesaid, their persons were searched and various papers taken therefrom. That thereupon a search was made of the suite of rooms in which Philip Gowen and William Bartels were arrested and as a result of this search, there were found approximately a dozen bottles of assorted intoxicating liquors. That a further search of the said suite of rooms in which the said defendants were arrested was made and a large number of memoranda, books of account,

[fol. 50] records, filing cases and other papers were found, all of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors. These papers included index lists with names and addresses of customers together with amounts outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold and delivered; detailed records of deliveries of intoxicating liquors to persons within the Southern District of New York and elsewhere; individual receipts for liquor deliveries signed by such customers; ledger accounts setting forth exact purchases of liquors made by particular customers, amounts due thereon, and amounts paid thereon; and letters and other correspondence having to do with the purchase, sale and delivery of intoxicating liquors.

That the said papers, memoranda, books, records and accounts so seized in the said premises by deponent are of such quantity and bulk that it is impractical to attach hereto copies thereof. That the said papers, memoranda, books, records and accounts so seized in the said premises by deponent, and now in the possession of Special Agents of the Treasury Department of the United States at the Sub-Treasury Building in New York City, are, however, specifically incorporated herein by reference and made a part hereof and are further made available for inspection at any time, if desired by the Court, in connection with the consideration of this order to show cause.

Eugene R. O'Brien.

Sworn to before me this 24th day of October, 1929.
Garrett W. Cotter, U. S. Commissioner, Southern District of New York. (Seal.)

[fol. 51] In United States District Court

Replying Affidavit of Philip D. Gowen in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

Philip D. Gowen being duly sworn, deposes and says: That he is a defendant in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929; of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030, by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

Your deponent walked into suite 1030 at about 10:30 A. M. and was accosted by said O'Brien. O'Brien said to your deponent, "What's your name"? Your deponent answered "Gowen", and then O'Brien pulled from his inner coat pocket a paper, and told your deponent that he was under arrest, and that he had a warrant, and that the paper was the warrant. Your deponent then asked said O'Brien [fol. 52] to permit your deponent to read the paper. O'Brien handed the paper to your deponent and your deponent read the paper and said to O'Brien, "This is not a search warrant. This is a warrant of arrest". Your deponent asked O'Brien for a duplicate and O'Brien said he did not have one, and that he would probably get one when he went downtown.

A while later, several other persons entered the premises and were also placed under arrest. At that time your deponent again read the said paper, which O'Brien had in his possession. Your deponent has not been able to secure a copy of this paper, but he believes that the said paper or papers constituted a warrant for his arrest, and an affidavit or complaint made out by one William J. Calhoun and sworn to by said Calhoun, and he believes that said papers are the same as those annexed to the motion papers filed on behalf of your deponent by his attorney, J. Edward Lumbard, Jr., as Exhibits A and B.

On the reverse or cover of said papers, there was the word "Warrant".

Philip D. Gowen.

Sworn to before me this 30th day of October, 1929.
Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF WILLIAM BARTELS IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

William Bartels, being duly sworn, deposes and says:

That he is a defendant in this action. That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030 by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

Your deponent was in said premises when said O'Brien walked in. O'Brien asked your deponent his name. Your deponent told him his name, and then O'Brien took from his coat pocket a paper and told your deponent that he was [fol. 54] under arrest, and that he had a warrant and that the paper was a warrant. Your deponent then asked said O'Brien to permit your deponent to read the paper. O'Brien handed the paper to your deponent, and your deponent read it and said to O'Brien, "This is not a search warrant; this is a warrant of arrest". Your deponent asked O'Brien for a duplicate and O'Brien said that he would probably get one when he went downtown.

A while later several other persons entered the premises and were also placed under arrest, and at that time your deponent again read the said paper which O'Brien had in his possession. Your deponent has not been able to secure a copy of this paper, but he believes that the said paper or papers constituted a warrant for his arrest, and an affidavit or complaint made out by one William J. Calhoun and sworn to by said Calhoun, and he believes that said papers are the same as those annexed to the motion papers filed on behalf of your deponent by his attorney, J. Edward Lumbard, Jr., as Exhibits A and B.

On the reverse or cover of said papers, there appeared the word, "Warrant".

William Bartels.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co., No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF RAY GARDNER IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Ray Gardner, being duly sworn, deposes and says, that he is one of the defendants in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030 by Eugene O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department, of the United States.

Your deponent walked into suite 1030 at about 11:55 A. M. and was accosted by said O'Brien. O'Brien said to your deponent, "What's your name?" Your deponent [fol. 56] answered, "Ray Gardner", and then O'Brien indicated a paper on a desk at which he was seated, and told your deponent that he was under arrest, and that he had a warrant. Your deponent believes the paper indicated was the warrant. When your deponent was in the premises, others of the defendants arrested at the premises were reading over a set of papers which your deponent understood had been turned over to them by the said O'Brien.

Your deponent has not secured a copy of these papers but he believes that the said papers constituted a warrant for his arrest, and an affidavit or complaint made out by one William J. Calhoun and sworn to by said Calhoun, and he believes that said papers are the same as those annexed to the motion papers filed on behalf of your deponent by his attorney, J. Edward Lumbard, Jr., as Exhibits A and B.

Ray Gardner.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF GEORGE HEATH IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

George Heath being duly sworn, deposes and says:

That he is a defendant in this action. That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030, by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

That your deponent was in said premises when said O'Brien walked in and asked your deponent what his name was. Your deponent gave his name and said O'Brien took [fol. 58] a paper from his coat pocket and said, "This is a warrant for your arrest." He handed some papers to your deponent, which papers consisted of about four sheets attached together. Your deponent read said papers. One

of said papers was a warrant for the arrest of your deponent and for other persons, and among the papers there was also a complaint made out by William J. Calhoun. Your deponent believes that said papers are the same as Exhibits A and B attached to the motion papers herein.

Said O'Brien was in the premises from about ten o'clock in the morning until two o'clock in the afternoon, and during this time he exhibited said papers to various persons in the premises and to those whom he placed under arrest, including Philip D. Gowen, William Bartels, William B. Flynn, William Howard, Ray Gardner, Robert McCauley and a Mr. McNesbit.

Your deponent was placed under arrest by the said O'Brien.

George Heath.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 59] In United States District Court

[Title omitted]

Replying Affidavit of William B. Flynn in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

William B. Flynn being duly sworn, deposes and says, that he is a defendant in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030 by Eugene R.

O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

That when your deponent entered said premises the said O'Brien accosted your deponent and asked him his business and his name. Your deponent stated that he was in the premises on business, and that his name was William B. Flynn.

Thereupon said O'Brien placed your deponent under arrest.

[fol. 60] Upon your deponent being placed under arrest, your deponent inquired of the said O'Brien his authority for the arrest. O'Brien told your deponent that the premises were under arrest, and that your deponent would have to stay. Neither O'Brien nor any one of the other two government agents in the premises, exhibited any warrant or paper to your deponent. However, when your deponent was in the premises others of the defendants arrested at the premises were reading over a set of papers which your deponent understood had been turned over to them by the said O'Brien. Your deponent read over part of said papers. One of the papers was a warrant for the arrest of various persons and included the name of "George Flynn, alias 'The Judge'" and the names of other persons arrested at premises 200 Fifth Avenue. Your deponent believes that said name of "George Flynn" referred to your deponent.

Your deponent was informed and verily believes that he was arrested under and by virtue of said warrant of arrest. Your deponent did not fully read over the said papers to any extent, but he believes the said papers were the same as Exhibits A and B annexed to the motion papers herein.

William B. Flynn.

Sworn to before me this 30th day of July, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF ROBERT MCCAULEY IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert McCauley, being duly sworn deposes and says, that he is one of the defendants in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this action.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, suite 1030 by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

Your deponent walked into suite 1030 at about 11:00 o'clock A. M. and was accosted by said O'Brien. O'Brien [fol. 62] asked your deponent what his name was and your deponent answered, "Robert McCauley". After O'Brien was told your deponent's name, he stated that deponent was under arrest and that he couldn't leave the premises. When your deponent was in the premises, others of the defendants who were arrested there were reading over a set of papers, and your deponent also read the said set of papers. Your deponent believes that said papers were a warrant for his arrest, and an affidavit or complaint made out by said William J. Calhoun and sworn to by said Calhoun, and he believes the said papers are the same as those annexed to the motion papers filed on behalf of your deponent by his attorney, J. Edward Lumbard, Jr., as Exhibits A and B.

Robert McCauley.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF WILLIAM HOWARD IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

William Howard, being duly sworn, deposes and says:

That he was formerly a defendant in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion, and also the affidavit of Philip D. Gowen, verified the 30th day of October, 1929, in support of this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, New York City, Suite 1030, by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States of America.

Your deponent walked into suite 1030, 200 Fifth Avenue, at about 12:30 P. M. on said 6th day of June, 1929, and was [fol. 64] accosted by O'Brien and other Prohibition Agents. Agent O'Brien asked your deponent what his name was and *and* what business he came there on. Your deponent replied and said he was there to see Mr. Bartels about some insurance. He then informed your deponent that he was a Federal Agent, that the place was "pinched" and that your deponent was under arrest. Said O'Brien then searched your deponent.

Your deponent asked agent O'Brien what he was arrested for. Agent O'Brien told him he was arrested for conspiracy.

Your deponent then saw Mr. Gowen holding a paper in his hands reading off some names. Your deponent asked him what it was and he said a warrant. Your deponent further asked him if his, your deponent's, name was on it and Mr. Gowen told him that it was not.

That subsequent to the foregoing occurrence, your deponent was arraigned before the United States Commissioner for the Southern District of New York, charged with a conspiracy to violate the National Prohibition Act. Subsequently, your deponent was discharged from custody, the complaint against your deponent dismissed and your deponent is, therefore, no longer a defendant in this action.

William Howard.

Sworn to before me this 31st day of October, 1929. J. Cassin Healy, Notary Public, Westchester Co., N. Y. Co. Clks. No. 593, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

[fol. 65] In United States District Court

[Title omitted]

Replying Affidavit of John R. MacNesbitt in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

John R. MacNesbitt, being duly sworn, deposes and says that he was formerly a defendant in this action.

That he has read the affidavit of Eugene R. O'Brien, verified the 24th day of October, 1929, the affidavit of Ernest Braidwood, verified the 24th day of October, 1929, and the affidavit of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion, and also the affidavit of Philip D. Gowen, verified the 30th day of October, 1929, in support of this motion.

That on the 6th day of June, 1929, he was arrested at premises 200 Fifth Avenue, New York City, suite 1030, by Eugene R. O'Brien, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

Your deponent walked into suite 1030 at about 10:45 A. M. on said day and was accosted by O'Brien and the [fol. 66] other prohibition agents. One of the other agents, whose name deponent does not know, informed your depo-

nent that he was under arrest. After this statement was made to your deponent, a paper was exhibited to your deponent by Philip D. Gowen, one of the defendants herein, which paper the said Gowen stated had been handed to him by the Prohibition Agents. Your deponent read this paper and saw that it was a warrant for the arrest of the said Philip D. Gowen and for certain other persons whose names your deponent cannot recall with exactness. That your deponent is informed and believes that the said warrant is the warrant referred to in the affidavit of Philip D. Gowen verified the 30th day of October, 1929, and submitted in support of this motion.

That subsequent to these conversations, your deponent was arrested and arraigned before the United States Commissioner for the Southern District of New York charged with a conspiracy to violate the National Prohibtion Act. That subsequently your deponent was discharged from custody and the complaint against your deponent dismissed, and your deponent is, therefore, no longer a defendant in this action.

John R. MacNesbitt.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 67] In United States District Court

[Title omitted]

Replying Affidavit of John B. Hobby in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

John B. Hobby, being duly sworn, deposes and says: That he was formerly a defendant in this action.

That on the 5th day of June, 1929, your deponent was arrested at premises No. 24 West Street, Borough of Man-

hattan, City of New York by three Special Agents of the Bureau of Prohibition, Treasury Department of the United States. That the name of one of the said agents, your deponent believes to be Arnold. That your deponent does not know the names of the other two Special Agents.

That the circumstances surrounding your deponent's arrest were as follows:

Your deponent was on the said premises No. 24 West Street, Borough of Manhattan, New York City, where your deponent is engaged in the warehouse business as an officer [fol. 68] of John B. Hobby Sons Co., on the 5th day of June, 1929, at about 10 o'clock A. M., when the said Arnold and the other two agents came into the premises. Your deponent was not on the ground floor of the said premises when the said agents came in, but was on one of the upper stories of the building. Upon being informed of the arrival of the said agents, your deponent went down to the ground floor of the premises. Upon reaching the ground floor of the premises, your deponent was accosted by Agent Arnold who, after inquiring as to your deponent's name, informed deponent that he had a warrant for your deponent's arrest and drew from his pocket a paper which he exhibited to your deponent as the said warrant.

That subsequent to these occurrences, your deponent was arrested and arraigned before the United States Commissioner for the Southern District of New York, charged with conspiracy to violate the National Prohibtion Act, and released on $2,500 bail. That subsequently the proceedings against your deponent were dropped and the charges against your deponent were dismissed.

John B. Hobby.

Sworn to before me this 31st day of October, 1929. Seymour B. Quel, Notary Public. N. Y. Co. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF MILFRED A. GANTS IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Milfred A. Gants, being duly sworn, deposes and says:

That he is a defendant in this action, being named herein as "Max A. Gants".

That he has read the affidavit of Eugene R. O'Brien, verified the 24th day of October, 1929, and the affidavit of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, your deponent was arrested at premises 3 East 28th Street, Borough of Manhattan, City of New York, by two Special Agents of the Bureau of Prohibition, Treasury Department of the United States, whose names your deponent believes to be Smith and Mullen.

The circumstances surrounding your deponent's arrest were as follows:

Your deponent was on the said premises No. 3 East 28th Street, New York City, where your deponent is engaged in the lamp importing business on the 6th day of June, [fol. 70] 1929, at about 10:00 A. M., when the said Smith and Mullen came into the said premises, accosted your deponent and, after inquiring as to you- deponent's name, informed your deponent that they had a warrant for his arrest, and thereupon the said Smith took from his pocket a paper which he exhibited to your deponent and told your deponent was the warrant for the arrest of your deponent. Your deponent asked that he be permitted to read the paper. Smith refused to let your deponent read the paper and thereupon the two agents proceeded to search the person of your deponent as well as the said premises. After the search of your deponent's person and the said premises had continued for about an hour, your deponent again de-

manded of the said Smith that he be permitted to read the alleged warrant. Smith again refused and when asked for a reason for his refusal, stated that he did not wish your deponent to read the said warrant because it contained the names of other persons and he did not wish your deponent to communicate with these other persons.

Your deponent has read the affidavit of Philip D. Gowen, verified the 30th day of October, 1929, submitted in support of this motion and your deponent verily believes that the paper exhibited to him by the said Smith was a warrant issued in this action for the arrest of your deponent and for the arrest of the other defendants herein.

Milfred A. Gants.

Sworn to before me this 31st day of October, 1929. Seymour B. Quel, Notary Public. N. Y. Co. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF GERTRUDE INTEMANN IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Gertrude Intemann, being duly sworn, deposes and says:

That she is the widow of Christian Intemann who was a defendant in this action. That on the 6th day of June, 1929, she was present when the said Christian Intemann was arrested on the premises at 152 West 17th Street, Borough of Manhattan, City of New York by E. F. Murphy, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

That the said arrest occurred about 10 A. M. on the said 6th day of June, 1929, when the said E. F. Murphy and

two other men entered the said premises at 152 West 17th Street.

That in the presence of your deponent, the said Murphy asked the said Christian Intemann his name, whereupon the [fol. 72] said Christian Intemann gave his name and Murphy thereupon told him that he was under arrest. Said Christian Intemann demanded to know by what authority he was placed under arrest and Murphy told him that he had a warrant for his arrest. Thereupon and in the presence of your deponent, Murphy drew from his pocket some papers which he showed to said Christian Intemann without permitting him to read the same and said to the said Christian Intemann that the papers were a warrant for his arrest.

The said Murphy told the said Christian Intemann in the presence of your deponent that he had a warrant to search the premises but he did not permit the said Christian Intemann or your deponent to read any of the said papers and he did not leave a copy of any papers with either the said Christian Intemann or your deponent.

Gertrude Intemann.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public. N. Y. Co. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLYING AFFIDAVIT OF ROBERT NELSON IN SUPPORT OF ORDER TO SHOW CAUSE.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert Nelson, being duly sworn, deposes and says:

That he was formerly one of the defendants in this action.

That on the 6th day of June, 1929, he was arrested at premises 2123 Vorhies Avenue, Borough of Brooklyn, City of New York.

That the arrest of your deponent occurred under the following circumstances:

That your deponent was on the said premises 2123 Vorhies Avenue, which is a private dwelling house where your deponent resides, on the said 6th day of June, 1929, when two Special Agents of the Bureau of Prohibition, Treasury Department of the United States of America, whose names your deponent believes to be Porter and Dunne, entered the [fol. 74] said premises. The said Agent Dunne informed your deponent that he had a warrant for the arrest of your deponent and also a search warrant to search the premises. That the said Agent Dunne exhibited to your deponent a paper which he said was the warrant for your deponent's arrest and your deponent read said paper and saw thereon the word "Warrant". That subsequent to these incidents, your deponent was arrested and arraigned before the United States Commissioner for the Southern District of New York, and that subsequently, the proceedings against your deponent were dismissed and the charges against your deponent were dropped.

Robert C. Nelson.

Sworn to before me this 31st day of October, 1929. L. G. Gerardin, Notary Public, Kings County, N. Y., No. 370. Certificate filed in Kings County, N. Y., Reg. No. 559. Commission expires March 30, 1930. (Seal.)

[fol. 75] In United States District Court

[Title omitted]

Replying Affidavit of Joseph M. Dooley in Support of Order to Show Cause

State of New York,
City of New York,
County of New York, ss:

Joseph M. Dooley, being duly sworn, deposes and says: That he is a defendant in this action.

That he has read the affidavits of Eugene R. O'Brien, verified the 24th day of October, 1929, of Ernest Braidwood, verified the 24th day of October, 1929, and of William J. Calhoun, verified the 25th day of October, 1929, in opposition to this motion.

That on the 6th day of June, 1929, he was arrested at premises No. 445 Twelfth Street, Borough of Brooklyn, New York City, by —— Thibedeau, Special Agent of the Bureau of Prohibition, Treasury Department of the United States.

The circumstances surrounding your deponent's arrest were as follows:

Your deponent was on the said premises at No. 445 Twelfth Street, Borough of Brooklyn, New York City, where [fol. 76] your deponent is engaged in the storage and warehouse business, on the said 6th day of June, 1929. At about 9 o'clock A. M., the said —— Thibedeau, Special Agent of the Bureau of Prohibition, Treasury Department of the United States, came into the said premises, accosted your deponent, and after inquiring as to your deponent's name, informed your deponent that he was under arrest. Thereupon your deponent said to him, "What am I under arrest for, and what is your authority for arresting me?" Thibedeau replied, "I am an officer of the Government and I have a warrant for your arrest." After making the above statement, Thibedeau took out of his pocket a paper which he showed to your deponent, and which he told your deponent was a warrant for your deponent's arrest. Your deponent then asked the said Thibedeau to permit your deponent to read the paper. The said Thibedeau refused to let your deponent read the paper, saying to your deponent that there were names on the warrant that he did not wish your deponent to see, and again informed your deponent that the said paper was a warrant for the arrest of your deponent.

Subsequent to this conversation, the said Thibedeau together with three other Agents who had entered the said premises, proceeded to search the said premises. Your deponent remonstrated with Thibedeau and protested against the search and asked Thibedeau what his authority for

searching the premises was. Thibedeau told your deponent that he had a search warrant to search the premises and intimated that he would use force if any resistance were offered. Your deponent asked to be shown the search warrant and thereupon Thibedeau waived in his hand the paper [fol. 77] which he had previously taken out and told your deponent was a warrant for the arrest of your deponent, now saying that the paper was a search warrant to search the premises. Your deponent again requested Thibedeau to permit your deponent to read the said paper, but Thibedeau refused to do so, saying to your deponent that there were names on the warrant that he did not wish your deponent to see.

Joseph M. Dooley.

Sworn to before me this 30th day of October, 1929. Seymour B. Quel, Notary Public, N. Y. Co. No. 5, Reg. No. 1Q12. Certificate filed in Westchester Co. Commission expires March 30th, 1931. (Seal.)

[fol. 78] In United States District Court

Supplemental Affidavit of Harold G. Sipe in Opposition to Order to Show Cause

State of New York,
County of New York,
Southern District of New York, ss:

Harold G. Sipe, being duly sworn, deposes and says:

That he is a duly appointed and commissioned agent and employee of the Commissioner of Prohibition of the Bureau of Prohibition and an officer of the Treasury Department of the United States of America, charged with the duties of enforcing the laws of the United States pertaining to narcotics and intoxicating liquors. That he has been such an officer continuously for a period of approximately two years heretofore.

That on June 6, 1929, deponent in company with Eugene R. O'Brien and Edward Collins, two brother officers, went

to premises known as 200 Fifth Avenue, in the City, State and Southern District of New York and there proceeded to suite 1030. Deponent in company with the other two officers entered the said suite which consisted of three rooms [fol. 79] occupied as offices and fitted up with regular office furniture, including chairs, desks, file cabinets and safes. In the said premises deponent found the defendant William Bartels and shortly thereafter the defendant Philip Gowen. Agent Eugene O'Brien stated to Bartels and Gowen that he was an officer of the United States and he placed them under arrest.

That at no time did dependent serve or attempt to serve or execute any warrant of arrest or search warrant upon the said Philip Gowen or William Bartels, nor did either officer O'Brien or Collins, who accompanied deponent do so. That deponent was present at the arrest of each of these two individuals and saw and heard what there took place. That deponent never made any return or any purported return upon any warrant or paper of any sort purporting to be a warrant of arrest or search in connection with the apprehension by officer Eugene O'Brien of the above mentioned Philip Gowen and William Bartels.

That after the arrests of Philip Gowen and William Bartels, as aforesaid, their persons were searched and various papers taken therefrom. That thereupon a search was made of the suite of rooms in which Philip Gowen and William Bartels were arrested and as a result of this search, there were found approximately a dozen bottles of assorted intoxicating liquors. That a further search of the said suite of rooms in which the said defendants were arrested was made and a large number of memoranda, books of account, records, filing cases and other papers were found, all of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors. These papers included index lists with names and addresses of customers together with amounts [fol. 80] outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold and delivered; detailed records of deliveries of intoxicating liquors to persons within the Southern District of New York and elsewhere; individual receipts for liquor deliveries signed by such customers; ledger accounts setting forth exact pur-

chases of liquors made by particular customers, amounts due thereon, and amounts paid thereon; and letters and other correspondence having to do with the purchase, sale and delivery of intoxicating liquors.

That the said papers, memoranda, books, records and accounts so seized in the said premises by Eugene O'Brien are of such quantity and bulk that it is impractical to attach hereto copies thereof. That the said papers, memoranda, books, records and accounts so seized in the said premises by Eugene O'Brien, and now in the possession of Special Agents of the Treasury Department of the United States at the Sub-Treasury Building in New York City, are, however, specifically incorporated herein by reference and made a part hereof and are further made available for inspection at any time, if desired by the Court, in connection with the consideration of this order to show cause.

H. G. Sipe.

Sworn to before me this 4th day of November, 1929. Francis A. O'Neill, U. S. Commissioner, Southern District of New York. (Seal.)

[fol. 81] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AFFIDAVIT OF EDWARD COLLINS IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Edward Collins, being duly sworn, deposes and says:

That he is a duly appointed and commissioned agent and employee of the Commissioner of Prohibition of the Bureau of Prohibition and an officer of the Treasury Department of the United States of America, charged with the duties of enforcing the laws of the United States pertaining to narcotics and intoxicating liquors. That he has been such an officer continuously for a period of approximately two years heretofore.

That on June 6, 1929, deponent in company with Eugene R. O'Brien and Harold G. Sipe, two brother officers, went

to premises known as 200 Fifth Avenue, in the City, State and Southern District of New York and there proceeded to suite 1030. Deponent in company with the other two officers entered the said suite which consisted of three rooms occupied as offices and fitted up with regular office furniture, including chairs, desks, file cabinets and safes. In said premises deponent found the defendant William [fol. 82] Bartels and shortly thereafter the defendant Philip Gowen. Agent Eugene O'Brien stated to Bartels and Gowen that he was an officer of the United States and he placed them under arrest.

That at no time did deponent serve or attempt to serve or execute any warrant of arrest or search warrant upon the said Philip Gowen or William Bartels, nor did either Officer O'Brien nor Sipe, who accompanied deponent do so. That deponent was present at the arrest of each of these two individuals and saw and heard what there took place. That deponent never made any return or any purported return upon any warrant or paper of any sort purporting to be a warrant of arrest or search in connection with the apprehension by Officer Eugene O'Brien of the above mentioned Philip Gowen and William Bartels.

That after the arrests of Philip Gowen and William Bartels, as aforesaid, their persons were searched and various papers taken therefrom. That thereupon a search was made of the suite of rooms in which Philip Gowen and William Bartels were arrested and as a result of this search, there were found approximately a dozen bottles of assorted intoxicating liquors. That a further search of the said suite of rooms in which the said defendants were arrested was made and a large number of memoranda, books of account, records, filing cases and other papers were found, all of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors. These papers included index lists with names and addresses of customers together with amounts outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold and delivered; detailed [fol. 83] records of deliveries of intoxicating liquors to persons within the Southern District of New York and elsewhere; individual receipts for liquor deliveries signed by such customers; ledger accounts setting forth exact pur-

chases of liquors made by particular customers, amounts due thereon, and amounts paid thereon; and letters and other correspondence having to do with the purchase, sale and delivery of intoxicating liquors.

That the said papers, memoranda, books, records and accounts so seized in the said premises by Eugene O'Brien are of such quantity and bulk that it is impractical to attach hereto copies thereof. That the said papers, memoranda, books, records and accounts so seized in the said premises by Eugene O'Brien, and now in the possession of Special Agents of the Treasury Department of the United States at the Sub-Treasury Building in New York City, are, however, specifically incorporated herein by reference and made a part hereof and are further made available for inspection at any time, if desired by the Court, in connection with the consideration of this order to show cause.

Edward Collins.

Sworn to before me this 4th day of November, 1929. Garrett W. Cotter, U. S. Commissioner, Southern District of New York. (Seal.)

[fol. 84] In United States District Court

United States of America, Complainant,

against

Philip D. Gowen, William Bartels, et al., Defendants

Memoranda of Coxe, D. J., Denying Order to Show Cause

Coxe, D. J.:

This is a motion for the return of papers and documents seized by Prohibition agents on June 6, 1929, at the time of the arrest of defendants Gowen and Bartels, at the office of Go-Bart Importing Company, Inc., 200 Fifth Avenue, New York City. On June 5, 1929, a warrant for the arrest of these two defendants and numerous others, was issued by Commissioner Cotter, directed to the Marshal of this District. The warrant was based on a complaint

of Special Agent Calhoun of the Bureau of Prohibition, verified June 5, 1929, which, in general terms, charged all of the defendants with being parties to a criminal conspiracy to violate the Prohibition Act, but failed to show any facts to sustain the charge or to justify the issuance of the warrant. Certified copies of the warrant and complaint were thereupon placed in the hands of Agent O'Brien, who, on June 6, 1929, went to the office of the Go-Bart Importing Company, Inc., 200 Fifth Avenue, New [fol. 85] York City, in company with Agents Collins and Sipe, and arrested there the defendants Gowen and Bartels, the President and Secretary and Treasurer, respectively, of the Go-Bart Importing Company, Inc. The officers of the Company were thereupon searched by the three agents, and the papers and documents, forming the subject of this motion, were seized and removed to the offices of the Prohibition authorities. It is conceded that the warrant of arrest, addressed to the Marshal of the District, could not be executed by Prohibition agents even though acting on official business. It is not disputed, either, that the warrant was invalid in that the complaint was palpably insufficient, and no attempt is made by the Government to justify the seizure on the basis of the warrant. Indeed, it is insisted by the Government that no use was made of the warrant at the time of the arrest, and that Agent O'Brien only took the papers with him "for the purpose of reference as to the addresses of the various defendants." This, however, is contradicted by the defendants Gowen and Bartels, who state in their moving affidavits that Agent O'Brien described the papers to them at the time of the arrests as "search warrants", and exhibited them to justify the demand for a search of the offices. On that issue, I am inclined to accept the story of the defendants, as I do not think it is at all reasonable to suppose that the Prohibition agents did not make some use of the warrant when challenged to show the authority under which they were proceeding in making the arrests. And I am satisfied they were challenged to show their authority, as arrests and seizures of the kind described in [fol. 86] these papers are not ordinarily made without some demand for credentials.

The question is whether the seizure can be sustained as an incident to an arrest without a warrant, when a con-

cededly invalid warrant was exhibited, and probably made use of, at the time of the arrest. If the arrest was lawfully made, the contemporaneous search of the offices, and the seizure of the "things connected with the crime as its fruits or as the means by which it was committed," was justified (Agnello v. U. S., 269 U. S. 20, 30; Carroll v. U. S., 267 U. S. 132, 158; Lee Kwong Nom v. U. S., 20 Fed. (2) 470-472).

The Prohibition agent who made the arrests had no authority other than that of a private person making an arrest without a warrant. Agnello v. U. S., 290 Fed. 671, 683, modified on another point in 269 U. S. 20, U. S. v. Goldman, 1924, D. C. S. D. N. Y. Unreported Opinion of Mack, C. J. But it is well settled that when a felony has in fact been committed, a private person may arrest without a warrant if he has reasonable grounds to believe that the person arrested committed the crime (Brady v. U. S., 300 Fed. 540; Carroll v. U. S., 267 132, 161). In the Carroll case (supra), Chief Justice Taft quotes with approval the following definition of probable cause from Stacey v. Emery, 97 U. S. 642, 645:

"If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

The information constituting probable cause may be obtained from others as well as from personal observation, [fol. 87] provided the facts are clearly established, and are sufficient to warrant a man of reasonable caution in the belief that the person arrested is guilty of the crime charged (Brady v. U. S., 300 Fed. 540; King v. U. S., 1 Fed. (2) 931; White v. U. S. 16 Fed. (2) 870; Prichett v. Sullivan, 182 Fed. 480, 482; U. S. v. Rembert, 284 Fed. 996).

I think the affidavits of Braidwood, Calhoun and O'Brien sufficiently establish for the purpose of this motion not only that a felony had been committed but also that Agent O'Brien had, prior to the arrests, reasonable cause to believe that the defendants Gowen and Bartels were parties to its commission. The affidavit of Braidwood describes in considerable detail extensive and open violations of the

Prohibition Act, and the connection of both defendants with the alleged conspiracy. This affidavit is a recital of specific facts within the personal knowledge of Braidwood, and covers a substantial period of time, dating back as far as March, 1927. The information obtained by Braidwood was communicated to Calhoun prior to June 5, 1929, and Calhoun thereupon made an independent investigation which corroborated the facts given to him by Braidwood. The affidavits then alleged that all of these facts, as ascertained by Braidwood and Calhoun, were told to Agent O'Brien by Calhoun prior to the arrest on June 6, 1929.

With this information in his possession, Agent O'Brien had reasonable grounds to believe that the defendants Gowen and Bartels had committed the felony described in the affidavits. There was, therefore, probable cause for the arrests. And the possession or use by Agent O'Brien [fol. 88] of the invalid warrant of arrest, issued by the Commissioner on June 5, 1929, did not render illegal arrests, which could lawfully have been made without it (Stallings v. Splain, 253 U. S. 339, 342; Lee Kwong Nom v. U. S. 20 Fed. (2) 470; Vachina v. U. S. 283 Fed. 35; Dowling v. Collins, 10 Fed. (2) 62).

It follows that the seizure of the papers and documents made contemporaneously with, and as an incident to, the arrests was lawful.

I do not deem it necessary or advisable to examine orally the persons whose affidavits have been presented on this motion, as I think the facts are sufficiently established by the affidavits themselves. It is, of course, understood that the findings of facts for the purpose of this motion are entirely without prejudice to the trial of the action.

The motion for the return of the documents and papers is, therefore, denied.

In disposing of this motion, as above indicated, I do not wish to be understood as approving the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed.

Dated December 9, 1929.

(Sgd) Alfred C. Coxe, U. S. D. J.

[fol. 89] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR REARGUMENT

SIR: Please take notice that upon the annexed affidavit of J. Edward Lumbard, Jr., verified the 16th day of December, 1929, the defendants Philip D. Gowen and William Bartels, and the petitioner Go-Bart Importing Company, Inc., will move this Court at a Term for Motions to be held in Room 331 of the Old Post Office Building, Broadway at Park Row, Borough of Manhattan, City of New York, on the 26th day of December, 1929, at 10:30 o'clock A. M. or as soon thereafter as counsel can be heard for an order directing a re-argument of the motion in the within action heretofore made by the said defendants Philip D. Gowen and William Bartels and the said petitioner Go-Bart Importing Company, Inc., for an order directing the return to them of certain papers and documents and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction from directly or indirectly using as evidence the said papers and documents, and granting the said defendants Philip D. Gowen and William Bartels and the said peti-[fol. 90] tioner Go-Bart Importing Company, Inc., leave to examine orally, under oath, Eugene R. O'Brien, William J. Calhoun, Ernest Braidwood, Edward Collins and Harold G. Sipe, and for such other and further relief as to the Court may seem just and proper.

Dated New York, December 16, 1929.

Yours, &c., J. Edward Lumbard, Jr., Attorney for Defendants Philip D. Gowen and William Bartels and the Petitioner Go-Bart Importing Co., Inc.

Office & Post Office address: 225 Broadway, Borough of Manhattan, City of New York.

To Charles H. Tuttle, Esq., United States Attorney, Southern District of New York, Old Post Office Building, New York, N. Y.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. EDWARD LUMBARD, JR., IN SUPPORT OF MOTION FOR REARGUMENT

STATE OF NEW YORK,
City and Southern District of New York, ss:

J. Edward Lumbard, Jr., being duly sworn, deposes and says:

That he is the attorney for the defendants Philip D. Gowen, William Bartels and for the petitioner, Go-Bart Importing Company, Inc.

That on August 22, 1929, the said defendants Philip D. Gowen and William Bartels and the said petitioner Go-Bart Importing Company, Inc., secured an order to show cause signed by Honorable Charles A. Boynton, United States District Judge, for the return of certain papers and documents and for the suppression of said papers and documents as evidence. That subsequently argument was had on the said order to show cause, before Honorable Alfred C. Coxe, United States District Judge, who on the 9th day of December, 1929, led an opinion denying the relief asked for by the defendants and the said petitioner.

[fol. 92] That subsequent to the filing of the opinion by the Court, your deponent has been informed and has come into possession of information which in the opinion of your deponent is important for the proper consideration of said order to show cause and a determination of the rights of the said defendants and the said petitioner.

That the affidavits previously filed by the said defendants and the said petitioner in support of their motion for the return of the books and papers, and their suppression from use in evidence showed that a complaint had been filed before U. S. Commission Garrett W. Cotter in the Southern District of New York by one William J. Calhoun on June 5, 1929; that on the same day, the said Commissioner had issued warrants for the arrest of the said defendants, Philip D. Gowen and William Bartels, and other persons; that agents and subordinates of the said William J. Calhoun had exhibited the said warrants of arrest to the

defend-nts and others at 200 Fifth Avenue and had there arrested the said Philip D. Gowen and the said William Bartels and other persons, although none of them were deputized to do so by the United States Marshal for the Southern District of New York, and neither said Marshal nor any of his deputies were present.

That the affidavits filed by the said defendants and the said petitioner further stated that after being arrested the said defendants and others arrested were arraigned before the United States Commissioner on the said complaint of the said William J. Calhoun and were held in bail for their appearance.

That your deponent further states that since the said ar- [fol. 93] raignment and holding of the defendants in bail, no further proceedings of any kind or nature have been taken against the said defendants and that they are still being held in bail to answer the complaint before the United States Commissioner. The defendants did not waive examination upon arraignment and a date was set for a hearing on the complaint. The hearing date has been adjourned from time to time and no hearing has been held.

That affidavits of Ernest Braidwood, William J. Calhoun and Eugene R. O'Brien were filed on behalf of the complainant in reply to the affidavits filed in support of the said motion. That those affidavits sought to show that Eugene R. O'Brien, the arresting officer, had had probable cause to believe that Philip D. Gowen, William Bartels and others had committed the felony of conspiring to commit an offense against the United States at the time that O'Brien made said arrests.

That the affidavit of Eugene R. O'Brien, the arresting officer, specifically stated that the arrests had not been made on any warrant issued by the U. S. Commissioner and that O'Brien did not serve or attempt to serve or execute any warrant of arrest and that O'Brien made no return on said warrant; that O'Brien stated in his affidavit on page 2:

"Deponent took a certified copy of the said complaint to which was attached a certified copy of a warrant of arrest for all defendants in the said complaint for the purpose of reference as to the names of the various defendants."

[fol. 94] That your deponent is now informed of further facts in regard to the arrest of the defendants as follows:

That after the arrest of the defendants they were taken to the Old Post Office Building at Broadway and Park Row, and the arresting officer O'Brien went into the office of the United States Marshal, Room 207 of said building, and he or his superior officer or some representative of the office of the United States Attorney, requested the United States Marshal and his deputies in said office to make a return to the U. S. Commissioner on said warrant to show that the Marshal had executed the same. That thereupon the United States Marshal refused to make such return but the United States Marshal went into the office of the United States Commissioner in Room 314 of said Old Post Office Building and there took the defendants in custody and presented them to the United States Commissioner; that thereafter, said United States Marshal caused entries to be made in the dockets in his office showing that he, on the 6th day of June, 1929, had arrested the said defendants.

Your deponent is further informed that the United States Commissioner, who issued the warrants, thereafter collected a fee from the Department of Justice, which fee was based upon the fact that a return had been made on these warrants by the United States Marshal.

Your deponent has, from time to time, made diligent inquiry in regard to any return made by the Marshal on these warrants; he has made a search of such records as he was permitted to see in the office of the United States Commissioner and from all the information which he was able to [fol. 95] obtain he has had no knowledge of any of these facts until after the argument of the motion and also after the court rendered its opinion on December 9, 1929; that this information was communicated to him by other attorneys acting for other defendants in this same matter. Your deponent has been diligent in securing all the information he could but has been unable to make a search of the records in the office of the United States Marshal and he has further been unable to verify any of these facts, in regard to the part played by the United States Marshal and his deputies but he believes such facts to be true.

Your deponent further urges that a rehearing be granted to defendants Philip D. Gowen and William Bartels and the petitioner Go-Bart Importing Company, Inc., for the following reasons:

1. It appears from the additional facts which have just come to your deponent's attention that the arrest of Philip D. Gowen and William Bartels and others arrested on June 6, 1929, by Agent O'Brien and the agents assisting him, were made under and by virtue of a warrant of arrest issued by the United States Commissioner pursuant to a complaint sworn to by William J. Calhoun before the said Commissioner on June 5, 1929, and that said arrests were docketed by the United States Marshal as having been made by him, and that fees were collected by the United States Commissioner because of the fact that the arrests had been made by the United States Marshal and that he had returned to him the defendants named in the warrant. Your deponent is, therefore of the opinion that the United States of America, the complainant, cannot now claim that [fol. 96] the arrests were not made pursuant to said complaint and said warrant and cannot now set up the claim that said arrests were made by Agent O'Brien on the ground that he had probable cause to believe that the defendants had committed a felony.

2. The Court has already indicated in its opinion its disbelief as to certain portions of the affidavit of Special Agent O'Brien in which affidavit O'Brien seeks to set forth facts showing that he had probable cause to believe that the defendants had committed a felony at the time he arrested them. The additional facts set forth above by your deponent show that the court has not had before it a complete picture of how the arrests of the defendants were made on the 6th day of June, 1929, and it appears that the affidavit of Special Agent O'Brien is misleading, and it further appears that the statement made in his affidavit and on which the Court rendered its opinion that he had probable cause to make said arrest are extremely improbable and should be further examined by the court. Your deponent further urges he should be given the opportunity as counsel for the defendants and the petitioner, to examine Agent Eugene R. O'Brien and William J. Calhoun and Ernest Braidwood on the basis of the statements made in their affidavits heretofore filed in reply to the application made by your deponent.

Wherefore your deponent respectfully prays that the Court grant a re-argument in this matter to the defendants

and the petitioner and that an order be entered permitting your deponent to orally examine, under oath, the said [fol. 97] Eugene R. O'Brien, William J. Calhoun, Ernest Braidwood, Edward Collins and Harold G. Sipe.

J. Edward Lumbard, Jr.

Sworn to before me this 16th day of December, 1929. J. Cassin Healy, Notary Public, Westchester Co. N. Y. Clk's No. 593, Reg. No. 1H415. Commission expires March 30, 1931. (Seal.)

IN UNITED STATES DISTRICT COURT

ORDER OF COXE, D. J., DENYING ORDER TO SHOW CAUSE AND MOTION TO REARGUE—Dec. 27, 1929

The defendants Philip D. Gowen and William Bartels and the petitioner Go-Bart Importing Company, Inc., having [fol. 98] moved this Court, and the said motion having regularly come on to be heard on the 1st day of November, 1929, for an order directing the return of certain papers and documents to the said Philip D. Gowen, the said William Bartels and the said Go-Bart Importing Company, Inc., and enjoining and restraining the complainant and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction from directly or indirectly using as evidence the said papers and documents, and the said Philip D. Gowen, the said William Bartels and the said Go-Bart Importing Company, Inc., having further moved this Court for a rehearing of the said motion,

Now upon reading and filing the order to show cause dated August 22, 1929, signed by the Honorable Charles A. Boynton, United States District Judge, and the affidavits of the defendants Philip D. Gowen and William Bartels, verified the 21st day of August, 1929, the affidavit of the petitioner Go-Bart Importing Company, Inc., by William Bartels, verified the 21st day of August, 1929, and the affidavits of the defendants Philip D. Gowen and William Bartels, and Ray Gardner, George Heath, William B. Flynn, Robert McCauley, John R. MacNesbitt, Gertrude In-

teman and Joseph M. Dooley, all verified on the 30th day of October, 1929, and the affidavits of William Howard, John B. Hobby, Milfred A. Gants and Robert Nelson, all verified the 31st day of October, 1929, in support of the said motion and the affidavits of Ernest Braidwood and Eugene R. O'Brien, verified the 24th day of October, 1929, the af- [fol. 99] fidavit of William J. Calhoun, verified the 25th day of October, 1929 and the affidavits of Harold G. Sipe, and Edward Collins, both verified the 4th day of November, 1929, in opposition to the motion, and the affidavit of J. Edward Lumbard, Jr., verified the 16th day of December, 1929, asking for a re-hearing of the said motion; and after hearing J. Edward Lumbard, Jr., in support of the said motion and Charles H. Tuttle, United States Attorney for the Southern District of New York (Robert B. Watts of counsel) in opposition thereto, and after reading and filing the opinion of the court dated the 9th day of December, 1929, it is

Ordered that the said motion be and the same hereby is denied; and it is further

Ordered that the motion for a rehearing of the said motion be and the same hereby is denied.

Alfred C. Coxe, U. S. D. J.

[fol. 100] In United States District Court

[Title omitted]

Notice of Appeal

Sir: Please take notice that the plaintiffs-in-error, Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, hereby appeal to the United States Circuit Court of Appeals held in and for the second Circuit, from an order and decree signed by the Honorable Alfred C. Coxe, United States District Judge, and entered herein on the 27th day of December, 1929, denying the motion of the said plaintiffs-in-error for an order directing the return of certain documents and papers to them and restraining the defendant-in-error and each of its officers, clerks, attorneys, agents, servants, and employees and all other persons act-

ing under its authority or direction, from directly or indirectly using as evidence the said papers and documents, and that the said plaintiffs-in-error hereby appeal from [fol. 101] each and every part of the said Order and Decree as well as from the whole thereof.

Dated New York, N. Y., December 27, 1929.

Yours, etc., J. Edward Lumbard, Jr., Attorney for the Plaintiffs-in-Error.

Office and P. O. Address: 225 Broadway, Borough of Manhattan, City of New York.

To Charles H. Tuttle, Esq., United States Attorney, Southern District of New York, Old Post Office Building, Broadway and Park Row, N. Y. C.

[fol. 102] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPEAL FROM ORDER DENYING ORDER TO SHOW CAUSE AND MOTION TO REARGUE

To the Honorable Judges of the United States District Court for the Southern District of New York:

Come now, the plaintiffs-in-error, Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, by their attorney, J. Edward Lumbard, Jr., and feeling aggrieved by the order and decree signed by the Honorable Alfred C. Coxe, entered herein on Decembbr 27, 1929, denying the motion of the said plaintiffs-in-error for an order directing the return of certain documents and papers to them and restraining the defendant-in-error and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction, from directly or indirectly using as evidence the said papers and documents, and complain that in the record and proceedings had in such case, manifest error has hap-[fol. 103] pened to the great damage of the petitioners as set forth in the assignments of error annexed hereto.

Wherefore the said plaintiff-in-error, Go-Bart Importing Company, Inc., Philip D. Gowen ,and William Bartels, do hereby appeal from the said order and decree to the Circuit Court of Appeals for the Second Circuit and pray that their appeal may be allowed and that a transcript of the record of the proceedings and papers upon which said order and decree is made, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit and that the same may be corrected.

Dated New York, N. Y., December 27, 1929.

J. Edward Lumbard, Jr., Attorney for the Plaintiffs-in-Error.

Office and P. O. Address: 225 Broadway, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The within appeal is allowed. The defendant-in-error and each of its officers, clerks, attorneys, agents, servants and employees and all other persons acting under its authority or direction and each and every one of them and all in privity with them are stayed from, directly or indirectly, using as evidence the papers and documents which are the [fol. 104] subject of this appeal, or any information, notes or memoranda made from the search or investigation of such papers and documents, or any photostatic copies or reproductions made of such papers and documents pending the entry of an order determining or dismissing the appeal.

Alfred C. Coxe, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Come now, the plaintiffs-in-error, Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, and

file the following assignments of error upon which they will rely upon their appeal from the order and decree entered herein on December 27, 1929, denying the motion of the said plaintiffs-in-error for an order directing the return of certain documents and papers to them and restraining the defendant-in-error and each of its officers, clerks, attorneys, [fol. 105] agents, servants and employees and all other persons acting under its authority and direction, from directly or indirectly, using as evidence the said papers and documents; to wit: that the Court erred in making the said order dated December 27, 1929, upon the following grounds:

1. That the warrant of arrest was improperly issued and in violation of the Fourth Amendment of the Constitution of the United States.

2. That the agents had no power to execute the warrant of arrest.

3. That there was no probable cause for believing that a felony had been committed.

4. That no felony had in fact been committed and there was no probable cause for believing the defendants to have committed it.

5. That at the time of making the arrests, the agents had no probable cause to believe that the persons arrested had committed a felony.

6. That the agents were not peace officers and could not arrest except where a felony had actually been committed and were governed by the same rules of law under which a private person may arrest another.

7. That the agents relied upon the warrant of arrest in making the said arrest and not upon probable cause to believe that a felony had been committed.

8. That the agents having relied upon the warrant of [fol. 106] arrest could not justify the arrest by showing probable cause for believing that a felony had been committed.

9. That the arrests being illegal, the arresting officers had no power or authority in law to search the premises and seize papers and records.

10. That in any event the agents had no power or authority in law to search the premises and seize papers and records which were not instruments of any crime.

11. That the agents had no power or authority to break into locked cabinets and safes and take papers and records therefrom.

Wherefore the plaintiffs-in-error pray that the order of the District Court be reversed.

J. Edward Lumbard, Jr., Attorney for the Plaintiffs-in-Error.

Office and P. O. Address: No. 225 Broadway, Borough of Manhattan, City of New York.

[fol. 107] Citation in usual form, omitted in printing.

[fol. 108] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

Dated New York, January —, 1930.

J. Edward Lumbard, Jr., Attorney for the Appellants. Charles H. Tuttle, United States Attorney, Attorney for the Appellee.

[fol. 109] Clerk's certificate to foregoing transcript omitted inprinting.

[fol. 110] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

GOWEN et al., Defendants; Go-Bart Importing Company, Inc., Philip D. Gowen and William Bartels, Appellants.

Before Manton, Swan and Augustus N. Hand, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

OPINION

Motion by Go-Bart Importing Company, a corporation, and by two individuals, Gowen and Bartels, for an order directing "the United States" to restore to them documents and papers alleged to have been illegally seized by prohibition agents, and for the suppression of such property as evidence. From an order denying the motion, the movers have appealed. Modified.

The seizure was not made under a search warrant. Justification is rested upon the ground that it was incidental to the arrest of Gowen and Bartels upon a charge of conspiracy to violate the National Prohibition Act. The facts concerning their arrest and the seizure of property in con- [fol. 111] nection therewith, may be summarized from the moving affidavits as follows:

Go-Bart Importing Company was engaged "in the business of importing", with offices consisting of three rooms at 200 Fifth Avenue, New York, Gowen being president and Bartels secretary-treasurer of the corporation. On the morning of June 6, 1929, agent O'Brien and two other special agents of the Bureau of Prohibition entered the offices of the corporation, and agent O'Brien placed under arrest Bartels, who was found there, and Gowen, who entered later. Upon their arrest their persons were searched and miscellaneous papers and memoranda taken from them. Under threat that force would be used, they were compelled

to unlock their desks and a safe, from which books of account, letter files, insurance policies, cancelled checks, and other documents were taken and carried to the office of William J. Calhoun, special agent in charge, where he and the United States Attorney have been examining them. Some of the documents and papers belong to Go-Bart Importing Company; but no attempt is made in the affidavits to segregate those belonging to the corporation from those of the individual appellants.

The moving affidavits also allege that agent O'Brien purported to act under a warrant of arrest and search. Agent O'Brien's affidavit denies this. He admits that he had possession of a certified copy of a warrant of arrest issued by a United States Commissioner for the Southern District of New York, and directed to the marshal, upon a complaint made by said William J. Calhoun, but asserts that he used [fol. 112] it merely as a memorandum of the names of the persons to arrest. He made no return of service of the warrant and no attempt is made to sustain the arrest by reason of it. The claim is that O'Brien had probable cause to arrest without warrant. The facts upon which this claim is based are set forth in the opposing affidavits of Braidwood, Calhoun and O'Brien. Braidwood's affidavit discloses that he had had dealings with Gowen, Bartels and others at the office of Go-Bart Importing Company where the arrest was made, over a period of eighteen months, beginning in March, 1927. He had bought liquor from them and had learned their methods of conducting their business of importing and selling liquor. The facts are set forth in detail, and these facts he reported to said Calhoun about April 15, 1929. Calhoun's affidavit recites that prior to June 6, 1929, he had received oral and written reports from Braidwood setting forth the facts stated in Braidwood's affidavit; that he had made independent investigations which corroborated these facts; and that he had related them to agent O'Brien and had assigned him to investigate further the criminal conspiracy of Gowen, Bartels, et al. O'Brien's affidavit alleges that prior to the arrest he had been informed by Calhoun of the facts stated in Braidwood's affidavit and of Calhoun's independent corroboration of such facts, and from such information he believed that Go-Bart Importing

Company, Gowen, Bartels, and other individuals had committed the felony of conspiring to violate the laws of the United States pertaining to intoxicating liquors. He had also seen Calhoun's complaint filed with the United States Commissioner. His affidavit then recites the story of the [fol. 113] arrest, search and seizure, not differing materially from the summary hereinbefore set forth, except that he denies that he purported to serve any warrant of arrest or search, and adds the fact that a dozen bottles of intoxicating liquor were found in the search of the offices. The moving affidavits do not mention the liquor or ask for its return.

On the day of their arrest Gowen and Bartels were taken before the United States Commissioner and were held in bail to answer the complaint upon which the aforesaid warrant was issued. On information and belief it is stated in an affidavit by appellants' attorney that the United States Marshal has made a return of service of the warrant although neither he nor any deputy marshal was present when agent O'Brien arrested Gowen and Bartels. Nothing further has been done in the proceeding before the commissioner.

On August 22nd, the appellants instituted the present proceeding in the district court, and obtained an order to show cause directed to "the United States of America, the complainant herein". The order bears the same title as the complaint before the commissioner. It may be noted that Go-Bart Importing Company was not named in said complaint. On December 27th the motion for restoration of the papers and suppression of them as evidence was denied, and an appeal was allowed. Pending the appeal, the United States, its officers and agents are enjoined from using as evidence the documents and papers, or information obtained therefrom.

[fol. 114] J. Edward Lumbard, Jr., for Appellants; Seymour B. Quel, of Counsel.

Robert B. Watts, Assistant United States Attorney, for Appellee.

SWAN, Circuit Judge:

The major premise of the appellants' argument is that the Fifth Amendment protects every person against in-

crimination by the use of evidence obtained through unreasonable search or seizure in violation of rights secured to him under the Fourth Amendment. This is unassailable. Agnello v. United States, 269 U. S. 20, 34; Marron v. United States, 275 U. S. 192, 194. The minor premise is that the seizure of the papers and documents in suit violated their rights under the Fourth Amendment. This the United States Attorney denies, asserting that the seizure was privileged as an incident to a lawful arrest of Gowen and Bartels. The legality of their arrest is, therefore, the first subject for consideration. It is challenged by the appellants upon the theory that an arresting officer who purports to act under a warrant may not justify on any other ground. It may be doubted whether an officer who makes no return of service of a warrant can be said to act under it; and whether the argument does not come to this: that an officer who tells the accused that he acts under a warrant can only justify by showing a legal warrant. But if it be assumed that O'Brien purported to act under the warrant, the contention that he may not otherwise justify cannot be sustained. As was said by the Supreme Court in Stallings v. Splain, 253 U. S. 339, 342, the possession of an insufficient warrant does not render illegal an arrest which [fol. 115] could lawfully be made without it. In numerous cases the insufficiency of search warrants has been held immaterial when the search and seizure might be otherwise justified. Marron v. United States, 275 U. S. 192; Vachina v. United States, 283 F. 35, 36 (C. C. A. 9); Fryar v. United States, 3 F. (2d) 598 (C. C. A. 6); Billingsby v. United States, 16 F. (2d) 754, 756; Lee Kwong Nom v. United States, 20 F. (2d) 470, 472 (C. C. A. 2); State v. The District Court, 231 Pac. 1107; cf. Murby v. United States, 293 F. 849, 852 (C. C. A. 1). These search warrant cases the appellants attempt to distinguish upon the ground that in them the arresting officers had evidence of crime committed in their presence, rather than probable cause to believe that the person arrested had previously committed a felony. The logic of the attempted distinction is not apparent, and we regard these cases as authorities against the appellants' first contention. See also Salisbury v. Commonwealth, 79 Ky. 425, involving an invalid warrant of arrest. Cases where a warrant is necessary to gain lawful entry to the

premises are distinguishable and have no application to the present situation.

The legality of the arrest is next attacked upon the ground tha O'Brien had no authority to arrest without warrant, because (1) a prohibition agent is not a peace officer; (2) the Treasury Regulations under which Prohibition agents act do not Sanction it unless crime is committed in the agent's presence; and (3) if the agent relies only upon the right of a private individual to arrest without warrant, [fol. 116] he did not have probable cause to believe that Gowen and Bartels had committed the felony for which they were arrested. We pass at once to the third branch of the argument, for if this is decided adversely to the appellants it will be unnecessary to consider the other two.

The New York Code of Criminal Procedure provides:

"Section 183. A private person may arrest another: * * *
2. When the person arrested has committed a felony, although not in his presence."

This in effect is declaratory of the common law which concededly permits a peace officer or a private individual to arrest without warrant where a felony has in fact been committed by the person arrested and the person making the arrest had probable cause for so believing. See Carroll v. United States, 267 U. S. 132, 161; Brady v. United States, 300 F. 540 (C. C. A. 6); Bishop, New Crim. Proc., 2nd ed. sec. 181. Braidwood's affidavit sets forth ample facts, none of which are denied, to show that Gowen and Bartels had conspired to violate the National Prohibition Act. We do not understand appellants to deny that Braidwood would have had sufficient reason to believe them guilty of a felony to justify an arrest by him without a warrant. The objection is that O'Brien's belief was based not upon personal knowledge but upon information obtained from his superior officer Calhoun, who in turn had received from Braidwood most of the information he imparted to O'Brien. It is urged that the "probable cause" which will justify arrest of a felon must be founded upon more than unsworn hearsay. But neither in reason nor upon the authorities is the rule so limited; rather, the test is whether the belief

[fol. 117] is reasonable. In Carroll v. United States, supra, the court said (p. 161):

"The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In Stacey v. Emery, 97 U. S. 642, 645, a suit for damages for seizure by a collector, this Court defines probable cause as follows:

'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.'"

Instances where the arrest has been sustained although the arresting officer acted on information obtained from others, rather than on personal knowledge, may be found in Brady v. United States, supra; King v. United States, 1 F. (2d) 931 (C. C. A. 9); White v. United States, 16 F. (2d) 870. Measured by the test above stated, we think O'Brien was justified. He had received his information from his superior officer, whose own investigations had corroborated the facts reported by investigator Braidwood. Calhoun, the superior officer, had sworn to a complaint charging Gowen and Bartels with the crime. It is true that that complaint was legally insufficient, but it may nevertheless be considered as affording O'Brien an additional reason for giving credence to the detailed facts Calhoun had stated to him concerning the conspiracy. The source of his information and the detailed character of it were such as to justify a cautious and prudent man in reaching the same conclusion as did O'Brien. It is urged that to sanction arrest upon information of this character and to permit a search as incidental to the arrest, makes it easy to fabricate a justification which the arresting officer [fol. 118] did not have when he made the arrest. This objection goes to the credibility of the officer's testimony, not to his right to make the arrest. Knowledge gained from the arrest or from a seizure incidental thereto cannot be used to support a finding of probable cause. See United States v. Maresca, 266 F. 713, 725 (D. C. S. D. N. Y.). But nothing is shown to raise doubt that O'Brien had received

before the arrests the information which he says he had. We conclude that the arrests were legal.

Granting this, it is urged that the search and seizure were illegal. In considering this argument it will be convenient to differentiate between the papers found on the persons of Gowen and Bartels, and those found in the search of the safe, desks and offices. It is not, and cannot be, denied that papers taken upon the person of the accused in connection with his lawful arrest, may be retained for use upon his trial, if relevant thereto. Agnello v. United States, 269 U. S. 20, 30; United States v. Kirschenblatt, 16 F. (2d) 202, 203 (C. C. A. 2). Therefore with respect to the papers found upon the individual appellants the order denying their return was clearly right.

The privilege of search incidental to a lawful arrest is not limited to search of the person; it extends to the premises where the arrest was made and permits seizure of property there located and within the control of the accused, if it be contraband, as in Carroll v. United States, supra, or "things used to carry on the criminal enterprise" as in [fol. 119] Marron v. United States, 275 U. S. 192. In the latter case, Marron and others were charged with conspiracy to maintain a nuisance in violation of the Prohibition Act. Having been convicted, Marron challenged the judgment on the ground of error in admitting evidence consisting of a ledger and certain bills seized by prohibition agents upon the premises where a fellow conspirator, Birdsall, had been arrested. The ledger showed "inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business". The bills were for gas, electric light, water and telephone service furnished on the premises. At the trial there was evidence that Marron made most of the entries in the ledger and that he was concerned as proprietor or partner in carrying on the business of selling intoxicating liquors. In affirming the conviction the court said (p. 198):

"When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. Every such place is by the National Prohibition Act declared to be a common nuisance, the maintenance of which is punishable by fine, imprisonment or both. * * *

The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. Agnello v. United States, supra, 30; Carroll v. United States, 267 U. S. 132, 158; Weeks v. United States, supra, 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediately possession and control. The authority of officers to search and seize the things by which [fol. 120] the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose. Cf. Sayers v. United States, 2 F. (2d) 146; Kirvin v. United States, supra; United States V. Kirschenblatt, supra. The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

This case the appellants attempt to distinguish upon the ground that the papers and ledger there seized were instruments of the crime of maintaining a nuisance while here the papers and documents are merely incriminatory evidence of the crime of conspiracy. We do not think the distinction can be substantiated. In the Marron case the crime charged was conspiracy to maintain a nuisance. Calhoun's complaint charged the identical crime. O'Brien's affidavit says that he placed Gowen and Bartels under arrest for "conspiring to violate the laws of the United States pertaining to intoxicating liquors." He does not expressly mention nuisance but the facts which he says he relied on—those stated in Braidwood's affidavit—show a conspiracy to maintain a nuisance and that a nuisance was maintained. Liquor was kept on the premises not usually in large quantities it is true, but rather as samples to show to purchasers.

Orders were there taken and paid for and sometimes deliveries were made at the office, though more often Braidwood obtained delivery at the "machine shop." It is true that the Marron premises were used as a saloon for retailing and drinking liquors, and the court refers to the officers' authority "to search and seize things by which the [fol. 121] nuisance was being maintained". But we cannot doubt that it is any less the maintaining of a nuisance within the statutory definition (27 U. S. C. A. 33) to conduct a wholesaling liquor business, even though only a small part of the liquor sold is kept on the premises or there delivered. The papers seized include names and addresses of customers with amounts outstanding as payable for liquors; detailed inventories of liquors received, sold, and delivered; individual receipts for liquor deliveries; letters and other correspondence having to do with the purchase, sale and delivery of liquors. These all come within the classification, applied in the Marron case to the bills, of things "so closely related to the business, it is not unreasonable to consider them as used to carry it on". Technically the papers may belong to the corporation rather than to its officers who were arrested; but the corporation was merely the cloak under which the individuals carried on their illegal business, and it, as well as they, was guilty of the conspiracy. No distinction can be based on the fact that Marran was a partner, while Gowen and Bartels were corporate officers. We regard the Marron case as controlling and as sustaining the seizure in suit. In United States v. Kirschenblatt, supra, this court laid down a more limited doctrine, but we do not think it can stand after the Marron decision.

Having disposed of the merits of the controversy it might seem unnecessary to say more; but in the interest of orderly procedure in cases of this type which are becoming so common, we shall discuss briefly the theory of proceedings for [fol. 122] the recovery of property alleged to be illegally seized.

First, as to the jurisdiction of the district court to entertain a summary motion of this nature as against the United States Attorney. Jurisdiction to give summary relief against an officer of the court is beyond doubt. See Cogen v. United States, 278 U. S. 221, 225; Matter of

Behrens (C. C. A. 2, opinion March 3, 1930). Nor do we question that a motion to prevent use by the United States Attorney of documents incompetent as evidence because illegally obtained by another officer of the government (Silverthorne Lumber Co. v. United States, 251 U. S. 385), may be made before there is any indictment or information pending against the maker of such motion. Perlman v. United States, 247 U. S. 7; Burdeau v. McDowell, 256 U. S. 465; Cogen v. United States, supra. Such officer of the court may be brought in by service of an order to show cause. As a matter of formal procedure, such order should be directed to him, not, as in the case at bar, to "the United States." But this informality may be ignored and we have treated the rule to show cause as if directed to the United States Attorney and also to agent Calhoun, who is alleged to have possession of the papers. Since the seizure is held valid, the appellants are entitled to no relief against the United States Attorney, and the order denying their motion as against him will be affirmed.

The district court's jurisdiction to control the disposition of property illegally held by one not an officer of the [fol. 123] court is a less simple problem. In Matter of Behrens, supra, we held that when forfeitable property is seized and held by prohibition officers, the legality of their seizure was to be determined in the forfeiture proceedings, not on summary motion for an order directing return of the property. Where, as here, the property consists of papers held for evidence not for forfeiture, the legality of the seizure cannot be so determined. On general principles it would seem that replevin, unless some statute forbids it, or a bill in equity, since temporary relief is sought against a threatened use of information contained in the papers, would be the appropriate remedy. See United States v. Casino, 286 F. 976, 978 (D. C. S. D. N. Y.); Sims v. Stuart, 291 F. 707, 709 (D. C. S. D. N. Y.); Applybe v. United States, 32 F. (2d) 873 (C. C. A. 9), rehearing denied 33 F. (2d) 897. We may assume, without the necessity of so deciding in the present case, that section 934 Rev. Stat. forbids replevin and that a bill in equity will lie to recover possession of papers illegally held by prohibition officers. See Sims v. Stuart, supra; 27 USCA sec. 45; Mayland v. Soper, 270 U. S. 9. Apparently the underlying assumption

of the appellants has been that an order directing the United States to show cause if served upon the district attorney will bring into court any representative of the government in any of its divers branches. This is wholly erroneous. See Weinstein v. Attorney General, 271 F. 673, 675 (C. C. A. 2); Applybe v. United States, supra. We are not informed of any statutory provision which gives the [fols. 124 & 125] district court summary jurisdiction to direct the return of papers illegally held by prohibition officers who have not acted under process of the court. Consequently so far as the appellants' motion sought relief against agent Calhoun the order to show cause should have been discharged.

The order appealed from must be modified accordingly. With respect to the relief asked against the United States Attorney, the order is affirmed: in respect to all other relief asked, the order is reversed and with directions to discharge the rule to show cause.

[fol. 126] In United States Circuit Court of Appeals, Second Circuit

United States, Plaintiff-Appellee,

v.

Go-Bart Importing Company, Inc., et al., Impleaded, etc., Appellants

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed Apr. 15, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, modified in accordance with the opinion of this court.

It is further ordered that a Mandate issue forthwith to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 127] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 128] In Supreme Court of the United States

Order Allowing Certiorari—Filed June 2, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,021. U. S. Circuit Court of Appeals, Second Circuit. Term No. 111. Go-Bart Importing Co., Philip D. Gowen and William Bartels, petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed May 12, 1930. File No. 35,021.